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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 137.

FRED C. RECTOR, TRUSTEE OF REINHARD & COMPANY,
PLAINTIFF IN ERROR,

vs.

THE CITY DEPOSIT BANK COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED DECEMBER 12, 1904.

(19,561.)

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1-4 Supreme Court of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Incorporated, and Existing under the Laws of the State of Ohio, Defendant in Error. } No. 8162.

Error to Circuit Court of Franklin County, Ohio.

Record.

Pugh & Pugh, Thomas E. Steele, attorneys for plaintiff in error.
Outhwaite, Linn & Thurman, attorneys for the defendant in error, The City Deposit Bank Company.

Filed Nov. 19, 1902, in supreme court of Ohio.

L. E. EMERSON, Clerk.

5 In the Supreme Court of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Incorporated, and Existing under the Laws of the State of Ohio, Defendant in Error. } No. 8162.

(No. 8162.)

Petition in Error.

(Filed November 1, 1902.)

Fred C. Rector, trustee in bankruptcy of Reinhard & Company, plaintiff in error, complains of the defendant in error, The City Deposit Bank Company, a corporation, duly organized, incorporated and existing under the laws of the State of Ohio, and says that by the consideration of the circuit court of Franklin county, at
6 the September, 1902, term thereof, in a certain case then and there pending, wherein this plaintiff in error was plaintiff in error and the defendant in error was defendant in error, the said defendant in error recovered a judgment against the said plaintiff in error, as of record is manifest; a transcript of the docket and journal entries thereof is filed herewith together with a transcript of the

docket and journal entries in the court of common pleas of Franklin county, with all and singular the original papers and proceedings in said case including the bill of exceptions.

There is error in said record, proceedings and judgment of said circuit court in this, to wit:

1. The said circuit court erred in affirming the judgment of the court of common pleas.
2. The said circuit court erred in not reversing the judgment of the court of common pleas.
3. Said judgment of the circuit court is contrary to law.
4. Other errors apparent upon the face of the record, which were and are prejudicial to this plaintiff in error.

This plaintiff in error, therefore, prays that said judgment may be reversed, and that he may be restored to all things he has lost thereby.

PUGH & PUGH,
THOMAS E. STEELE,
Attorneys for Plaintiff in Error.

Waiver.

The defendant in error, by its attorneys undersigned, hereby waives the issuing of summons and service of process and enters its appearance herein.

OUTHWAITE, LINN & THURMAN,
Attorneys for the Defendant in Error,
The City Deposit Bank Company.

7 In the Circuit Court of Franklin County, Ohio.

FRED C. RECTOR, as Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized and Existing and Incorporated under and by Virtue of the Laws of the State of Ohio, Defendant in Error. (No. 1896.)

Transcript of Docket and Journal Entries.

1902, April 12.—Petition in error filed; issuing and service of summons waived and appearance of defendant in error entered by Outhwaite, Linn and Thurman, its attorneys.

1902, April 12.—Transcript of docket and journal entries filed.

1902, April 12.—Eight original papers filed.

1902, April 12.—Bill of exceptions filed.

1902, October 27.—Judgment affirmed; plaintiff in error to pay costs.

September Term, October 27, 1902.

8 The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said Fred C. Rector, trustee, plaintiff in error herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the court of common pleas of Franklin county, Ohio, filed therewith in the said action, wherein Fred C. Rector, trustee, was plaintiff, and The City Deposit Bank was defendant mentioned and referred to in said petition in error, and was argued by counsel; upon consideration whereof the court find that there is no error manifest upon the face of the record in said orders and judgment of said court of common pleas.

It is thereupon considered, ordered and adjudged by this court, that the judgment and proceedings of the said court of common pleas, in said action in favor of the said defendant in error, and against the said plaintiff in error, be and the same are hereby in all things affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $—, and in default thereof that execution issue therefor.

Ordered, that a special mandate be sent to the court of common pleas of Franklin county, to carry this judgment into execution.

To each and all of the foregoing orders, rulings, and judgment and especially to the judgment affirming the judgment of the court of common pleas the plaintiff in error then and there excepted.

(Certificate attached.)

9 Petition in Error.

(Filed April 12, 1902.)

The plaintiff in error, Fred C. Rector, as trustee of Reinhard & Company, plaintiff in error, respectfully shows and represents to the court, that, by the consideration of the court of common pleas of Franklin county, Ohio, at the January, 1902, term of said court, in a case then and therein pending, wherein this plaintiff in error was plaintiff, and The City Deposit Bank Company, a corporation duly organized, existing and incorporated under and by virtue of the laws of the State of Ohio, defendant in error, was defendant, the said defendant in error recovered a judgment againt the said plaintiff in error, as of record is manifest, a certified transcript of the journal and docket entries in said case are filed herewith, together with all and singular the original papers, including the bill of exceptions.

There is error in the said record, judgments and proceedings of said court of common pleas in the following respects, to wit:

First. Said court of common pleas erred in withdrawing said case from the jury and dismissing the plaintiff's petition.

Second. Said court of common pleas erred in denying the said plaintiff a trial by jury and in deciding and disposing of said case without a jury.

Third. The said court of common pleas erred at the trial of said case in admitting evidence against the objection of the said plaintiff, to which he at the time excepted.

10 Fourth. The said court erred in excluding competent testimony offered by the plaintiff, to which ruling he at the time excepted.

Fifth. The said court of common pleas erred in holding, when the plaintiff rested his case, that he had offered no testimony tending to prove the averments of his petition and in withdrawing the jury and in deciding said case without a jury.

Sixth. Said court of common pleas erred in sustaining the motion made by the defendant at the conclusion of plaintiff's testimony, as of record is manifest.

Seventh. Said court erred in rendering judgment for the defendant instead of for the plaintiff.

Eighth. Said rulings and judgments of said common pleas court, and each of them, were and are contrary to law.

Ninth. Errors of law occurring at the trial, to which the plaintiff at the time excepted.

Tenth. Other errors of record manifest which were and are prejudicial to this plaintiff in error.

Wherefore, this plaintiff in error prays that the judgment of the court of common pleas may be reversed, set aside and held for naught, and that he may be restored to all things he has lost thereby and for all other proper relief.

D. F. PUGH,
THOMAS E. STEELE,
Attorneys for Plaintiff in Error.

11 Waiver.

The City Bank Deposit Company, defendant in error, by its attorneys undersigned, hereby enters its appearance in this case and waives the issuing of summons in error and service of process upon it.

OUTHWAITE, LINN & THURMAN,
Attorneys for Defendant in Error.

April 12, 1902.

12 In the Court of Common Pleas, Franklin County, Ohio.

FRED C. RECTOR, as Trustee of Reinhard & Company, Plaintiff,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Existing, and Incorporated under and by Virtue of the Laws of the State of Ohio, Defendant. } (No. 42210.)

Transcript of Docket and Journal Entries.

1900, December 1.—Petition and affidavit filed.

1900, December 3.—Precipe filed; summons issued to sheriff of Franklin county, Ohio; return December 17; answer January 5, 1901.

1900, December 7.—Entry of appearance entered by The City Deposit Bank Company, by Outhwaite, Linn & Thurman, its attorneys.

1900, December 15.—Notice for trial filed by plaintiff.

1900, December 26.—Notice for trial filed by plaintiff.

1901, January 5.—Answer filed.

1901, March 21.—Notice for trial filed by plaintiff.

1901, March 28.—Notice for trial filed by plaintiff.

1901, August 14.—Notice for trial filed by plaintiff.

13 1901, August 26.—Notice for trial filed by plaintiff.

1901, December 21.—Notice for trial filed by plaintiff.

1901, December 21.—Notice for trial filed by plaintiff.

1902, March 3.—Florence Knowlton appointed stenographer; bond filed. 125–405.

1902, March 3.—By consent this cause to be tried by eleven jurors; jury impaneled and sworn; motion to withdraw juror sustained. Exception. 125–407.

1902, March 4.—Motion of plaintiff for new trial filed.

1902, March 5.—Motion of plaintiff for new trial filed.

1902, March 5.—Motion to withdraw juror sustained; judgment for defendant *vs.* plaintiff for costs; exception. 125–408.

1902, March 5.—Motion for new trial overruled; ex. 125–408.

1902, March 19.—Bill of exceptions filed.

1902, March 19.—Bill of exceptions allowed as per entry. 125–432.

March 3, 1902, January Term.

This day upon application of both the plaintiff and defendant herein, it is ordered by the court, upon said plaintiff and defendant giving bond to Franklin county for the payment of the fees of the stenographer herein, that Miss Florence Knowlton, one of the official stenographers of this court, is appointed to take the testimony in this case, and the bond herein required is filed.

MARCH 3, 1902.

This day came the parties herein by their attorneys, also came the following named persons as jurors, to wit: Samuel Coleman,
14 W. H. Umbaugh, Robert Reese, James Queen, Edward Miner, George Leiter, J. W. Savely, E. S. Caylor, Sanford Leap, Irvine Zwayer and George Waggoner, and both parties agreeing to try this cause before the above eleven named persons, this cause came on to be heard upon the pleadings, evidence and arguments. The plaintiff having rested in its testimony, this cause came on to be heard upon the motion of the defendant to withdraw this cause from the jury, was argued by counsel and submitted to the court; and the court after careful consideration and due deliberation, sustained said motion. To which ruling of the court the plaintiff excepts.

This cause coming on to be heard on the motion of the defendant, made in open court, that the cause be withdrawn from the jury, and that a judgment be entered in favor of the defendant, and was argued by counsel, and submitted to the court; on consideration whereof, the court being fully advised in the premises, finds that said motion of the said defendant is well taken, and that said cause should be withdrawn from the jury, and judgment entered for said defendant; wherefore, it is ordered, adjudged and decreed that said cause be, and the same is, hereby withdrawn from the jury, and judgment dismissing the action and for costs ordered to be entered in favor of the said defendant, to all of which findings, judgment and decrees plaintiff excepts.

MARCH 5, 1902.

This cause came on to be heard on the motion of plaintiff filed herein for a new trial, and was argued by counsel and sub-
15 mitted to the court; in consideration thereof, the court being fully advised in the premises, finds that said motion for a new trial is not well taken; wherefore, it is ordered, adjudged and decreed by the said court that said motion of plaintiff for a new trial filed herein be, and the same is hereby overruled, to which findings and judgment the plaintiff hereby excepts.

MARCH 19, 1902.

Now comes the plaintiff, Fred C. Rector, as trustee in bankruptcy of Reinhard & Company, John G. Reinhard and Henry A. Reinhard, and presents his bill of exceptions, which the court finds was duly presented to opposite counsel and to the court and signed and approved by them at the times stated therein as the statutes require, and which is allowed and signed by the court, and made part of the record in this case, but not spread upon the journal.

(Certificate attached.)

Petition.

(Filed December 1, 1900.)

The plaintiff respectfully represents and avers that on the thirteenth day of September, A. D. 1900, he was duly appointed trustee of Reinhard & Company, bankrupts, and he thereupon accepted such trust, and duly qualified, and ever since has been the duly appointed, legally qualified and acting trustee in bankruptcy of said Reinhard & Company.

He further represents that prior to that time, to wit, on August 10, A. D. 1900, in a proceeding then and there pending for that
16 purpose in the district court of the United States, of the southern district of Ohio, eastern division, the said Reinhard & Company, were adjudged bankrupt, and said petition for such adjudication was duly filed in said court on April 11, A. D. 1900.

The City Deposit Bank Company, is, and was, at all the times hereafter referred to, a corporation duly organized, existing and incorporated under and by virtue of the laws of the State of Ohio, and is, and was, carrying on the banking business, pursuant to law. in the city of Columbus, Ohio.

Plaintiff avers and represents to the court that on April 10, A. D. 1900, the said Reinhard & Company, a partnership, consisting of John G. Reinhard and Henry A. Reinhard, through the deeds of its individual members, committed an act of bankruptcy, to wit, made a general assignment for the benefit of its creditors.

This plaintiff further avers that on said April 10, A. D. 1900, the said Reinhard & Company assigned and transferred to the City Deposit Bank Company, and the said City Deposit Company received of the moneys belonging to said Reinhard & Company, $1,300.

Plaintiff says that said payment to the City Deposit Bank Company was made for the purpose of giving an unlawful and fraudulent preference to the said The City Deposit Bank Company, and was by it for such purpose so received, and said transfer was made to defraud the creditors of said Reinhard & Company.

Wherefore this plaintiff, Fred C. Rector, as trustee in bankruptcy for Reinhard & Company, prays judgment against the City
17 Deposit Bank Company, for $1,300, with interest from April 10, A. D. 1900, and for his costs herein expended.

PUGH & PUGH,
THOMAS E. STEELE,
Attorneys for Plaintiff.

(Duly verified.)

Answer.

(Filed January 5, 1901.)

Defendant admits the appointment, acceptance and qualification of Fred C. Rector, as trustee in bankruptcy of Reinhard & Company, and the adjudication of said Reinhard & Company as bankrupts, and the due incorporation of the City Deposit Bank Company, and the general assignment made by said Reinhard & Company for the benefit of its creditors.

Defendant denies all the other allegations of the petition.

OUTHWAITE, LINN & THURMAN,
Attorneys for Defendant.

(Duly verified.)

Motion for New Trial.

(Filed March 4, 1902.)

Now comes the plaintiff and respectfully moves the court to set aside the judgment heretofore rendered and to award him a new trial herein for the following reasons and upon the following grounds, to wit:

1. The court erred in excluding competent testimony offered by the plaintiff, to which rulings the plaintiff at the time excepted.

2. The court erred in admitting incompetent testimony
18 offered by the said defendant upon cross-examination of plaintiff's witnesses, to which rulings the plaintiff at the time excepted.

3. The court erred in sustaining defendant's oral motion to arrest the testimony from the jury and to render judgment for the defendant.

4. Said court erred in not submitting the testimony in this case to a jury for its determination.

5. Said court erred in depriving the plaintiff of his right to a trial by jury.

6. Said court erred in rendering judgment for the defendant.

7. Said court erred in rendering judgment for the defendant after a jury had been demanded by the plaintiff and the same had been impaneled; the plaintiff at no time waiving his right to a jury trial.

8. The court erred in arresting the testimony from the jury.

9. The court erred in rendering judgment for the defendant.

10. The court erred in arresting the testimony from the jury and in rendering a judgment for the defendant.

11. Misconduct of the court in so far as said court, by its order

and judgment, deprived the plaintiff of his constitutional right to a trial by jury and rendered judgment against him.

12. The court erred in holding and deciding that the plaintiff introduced no evidence tending to prove the issuable facts plead in his petition and thereupon arresting the plaintiff's testimony from the jury and in rendering judgment upon such testimony, so offered by the plaintiff, in favor of the defendant.

PUGH & PUGH,
THOMAS E. STEELE,
Attorneys for Plaintiff.

19 Bill of Exceptions.

(Filed March 19, 1902.)

Present: Messrs. Pugh & Pugh, and Mr. Thomas E. Steele, on behalf of plaintiff; Messrs. Outhwaite and Thurman, on behalf of defendant.

Be it remembered, that on the trial of the above entitled cause, at the January term, A. D. 1902, of the court of common pleas, Franklin county, Ohio, before Hon. De Witt C. Badger, judge, and a jury, the plaintiff, to maintain the issues on his part to be maintained, introduced and offered in testimony the following evidence, to wit:

Morning Session, March 3, 1902.

JOHN FIELD, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. STEELE:

Q. State your name.
A. John Field.
Q. Mr. Field, you are the manager of the Columbus clearing house, are you?
A. Yes, sir.
Q. And were in April, 1900?
A. Yes, sir.
Q. You were such manager April 10, 1900?
A. Yes, sir.

20 Q. The City Deposit bank was at that time a member of the clearing house?
A. It was.
Q. And also Reinhard & Company?
A. Yes, sir.
Q. All checks drawn on the Columbus clearing house were drawn by you, were they, Mr. Field?
A. Yes, sir.
Q. Do you remember the fact, or hearing of the fact that the

Reinhard & Company bank had made an assignment upon the day it occurred?

A. Yes.

Q. About what time in the day did you learn that?

A. I learned that about, I should judge about one o'clock.

Q. Had you any moneys in your hands or subject to your orders as manager of the clearing house at that time belonging to Reinhard & Company?

A. I had a balance that stood on my books as due Reinhard & Company bank of something like a couple of thousand dollars; I do not know the exact amount.

Q. What was done with that balance?

A. Well, I gave a check to the City Deposit bank for twelve or thirteen hundred dollars; I could tell you the exact amount if you want *to* me to get the book.

Q. You better get the exact amount I guess, Mr. Field.

A. (Here witness refers to book.) I gave a check to the City Deposit bank for $1161.74.

Q. What other check?

A. One to the Commercial bank for $970.45.

Q. Did that exhaust their balance?

A. That exhausted it exactly.

Q. Have you in your possession or under your control that check given to the City Deposit bank?

A. I do not understand you.

21 Q. Have you it in your possession?

A. It is now I suppose in the Capital City bank, as it was given on the Capital City bank, cashed by them I suppose.

Q. You were the drawer of the check, were you not?

A. Yes.

Q. Are not those checks brought back to you?

A. No, never.

Q. What voucher have you?

A. I have none in that line at all.

Q. Have none at all?

A. No, no; we never use it that way.

Q. The balance was how much then of those amounts added together?

A. Total $2132.19.

Q. How was that fund made up, how was that balance acquired?

A. Well, that day Reinhard & Company brought to the clearing house checks on other banks to the amount of $2132.19.

Q. Yes.

A. Checks on other banks.

Q. Those checks were the property of Reinhard & Company?

A. Yes, sir.

Q. They could have gone to the different banks and got the currency for them if they had seen fit?

A. Yes.

Q. But for convenience they were brought to you for collection?
A. Yes.
Q. Those checks were never surrendered to Reinhard & Company?
A. No.
Q. The checks they brought?
A. No, sir.
Q. Or to their assignee or receiver or trustee?
A. No.
Q. Or to any one representing them?
A. No, sir.
22 Q. And this $2132.19 is the money realized by you from those checks?
A. Yes.
Q. And that money, or no part of it was ever surrendered to Reinhard & Company?
A. No.
Q. But was applied by you to pay certain creditors?

(Question objected to by defendant as leading.)

Q. I will ask you whether or not then, Mr. Field, whether or not this $2132 or any part thereof was paid to Reinhard & Company or any members of their firm, or any person purporting to be a trustee, assignee or receiver of that firm?
A. Now let me think about that.
Q. They were all paid to these two banks, wer-n't they?
A. Yes.
Q. It was all paid to these two banks?
A. Yes, given to these two banks.
Q. Now, was there any reason why this money was paid to these two banks other than you learned or were informed that these banks were creditors of Reinhard & Company?

(Question objected to as leading and suggestive; objection sustained.)

Q. You may state whether or not any reason existed or was advanced at the time by those two banks, or either of them which led you to pay these sums of money to them other than the alleged fact, if such a fact was alleged, that they were creditors of Reinhard & Company?

Mr. OUTHWAITE: We are not trying the other case; we object to any mingling of the two together.
(Objection sustained.)

23 Q. Confine your answer then to the defendant bank, the Capital City Deposit bank; why did you pay that money to that bank?
A. Well, on the day before I had issued a check on the Reinhard

& Company bank to the City Deposit bank for that amount, $1161.74.

Q. Stop right there; why was such a check given, was it because Reinhard & Company owed them that money?

A. No; they owed the clearing house.

Mr. OUTHWAITE: We object to the latter part of the question; we do not object to the first, why was the check given.

(Objection sustained.)

A. As I stated before, the check—you want to know why the check was given, $1161.74, on the day before?

Q. That is the pending question.

A. The check was given because the Reinhard & Company bank owed the clearing house that amount and more, and I used my discretion in giving that check to any creditor bank of the clearing house, and as it happened the City Deposit bank got that check; I might have given it to some other bank.

Q. You gave a check then for the benefit or to the order of the City Deposit bank for this amount against Reinhard & Company?

A. Yes, sir.

Q. That entitled that bank to go to Reinhard & Company and get that amount of money?

A. Yes.

Q. As a matter of fact, was that check ever cashed, or do you know?

A. That check was cleared the next day through the clearing house on Reinhard & Company.

Q. That is, paid off, was it?

24 (Question objected to by defendant as leading.)

Q. What do you mean by "cleared"?

A. Just the same as any other checks that day on Reinhard & Company bank, included any other amount.

Q. Were any checks cleared on Reinhard & Company's bank that day?

A. Yes.

Q. What checks?

A. Let me see, I do not know as I could tell you the exact amount; I could tell you the total amount.

Q. What is the total?

A. $6369.30.

Q. Was cleared on Reinhard & Company's bank?

A. Yes.

Q. Do you mean that such checks were actually paid by anybody?

A. They were sent through the clearing house and taken by their messenger down to the bank; later returned to me.

Q. To Reinhard & Company's bank?

A. Yes.

Q. And brought back unpaid?

A. Later returned to me all unpaid and I returned them to the different banks from which they came.

Q. Exactly; then as a matter of fact there was not a single check cleared through the clearing house that day against Reinhard & Company?

(Question objected to by the defendant as argumentative; objection overruled.)

(Question read.)

A. No, there was not.

Q. When was it that all the checks drawn on Reinhard's company were brought to you dishonored?

A. You mean what time of day?

Q. Yes.

A. I should judge about 1 o'clock.

Q. One o'clock?

A. Yes.

Q. You then knew, of course, that Reinhard & Company had made an assignment?

A. At that time, yes.

Q. You knew that?

A. Yes; he stated it when he brought it back.

Q. The checks, however, which Reinhard & Company had brought to the clearing house to the extent of at least $2132.19 had been cleared upon the various banks?

A. Yes.

Q. And that money, or the credit representing it you had?

A. Yes; I had the credit.

Q. What?

A. I had the credit on the money, the credit balance.

Q. The Columbus Clearing House Company owed Reinhard & Company that amount of money?

A. Yes.

Q. You did not attempt to pro-rate that $2100 among the $6000 of checks that had been dishonored that day, did you?

A. No.

Q. Nor did you turn it over to the assignee?

A. No.

Q. But you divided it between two certain creditors, to wit, the City Deposit bank and the Commercial national bank, is that the fact?

(Question objected to as leading and suggestive; objection sustained.)

Q. To what person or persons, natural or artificial, or both, was this sum of $2132.19 given or paid that day?

A. I stated that before.

Q. I know you did, but they compel us like in a law school to repeat it over again.

A. $1161.74 to the City Deposit bank; $970.45 to the Commercial national bank.

26 Q. How was this check transmitted to the City Deposit bank, by mail or delivered by some person?

A. I took it up there myself.

Q. About what time in the day?

A. About 2 o'clock, I should judge, when I got there.

Q. Who did you see there?

A. Mr. Jennings.

Q. He is the man in control there, the active manager of the bank?

A. Yes.

Q. What talk did you have about the Reinhard failure?

A. Well, in taking that up there I also took with me the check which they had cleared that day on Reinhard & Company's bank which was this balance of the day before, $1161.74; I took that check back to them as it was returned by Reinhard & Company to me.

Q. It was returned?

A. Yes.

Q. It had been cleared?

A. It had been cleared but returned to me; I think, too, I took a check for this amount on the Capital City bank, and took up this check that I had returned to them, or Reinhard had returned to them, took that up substituting this check on the Capital City bank.

Q. Let us have the conversation about the Reinhard failure with Mr. Jennings.

A. I do not believe there was much conversation about it.

Q. Let us have what it was, much or little?

A. It is a good while ago.

Q. I know it.

A. I told him that the Reinhards had failed, and that his check had been returned and that I had a balance due Reinhard & Company, and that I would substitute a check on the Capital City bank for this check on Reinhard, which had been returned.

27 Q. What answer did he make?

A. Mr. Jennings said that he would—I think he said he would telephone Mr. Outhwaite, and if it was all right he would return my check, the Reinhard check, or rather, to go back—I had given them a check for their balance of $3714.24, I had given that check to their messenger on the Deshler bank to let him take back with him at noon.

Q. You will excuse me a moment. Did this check of thirty-seven hundred odd dollars sent to the City Deposit bank by a messenger and drawn upon the Deshler national bank represent the balance due that bank from the Columbus clearing house on that day?

A. Yes; the balance due the City Deposit bank from the clearing house.

Q. In that $3714 is included the Reinhard & Company's check?

Mr. OUTHWAITE: How do you mean included? We object to the question.

The COURT: If he can answer he may do so.

A. That is the check of the day before, do you mean?

Q. Yes.

A. Yes, included in that.

Q. Had the City Deposit bank yet cashed your check on the Deshler national bank?

A. No, sir; not to my knowledge.

Q. What?

A. No, I think not.

Q. How did you expect to fix that matter up, were you going to give them another check in lieu of the $3700 check?

A. I gave them a check for the $1161.74 and the balance of that $3714 on some other bank is my recollection of it now.

28 Q. Then they surrendered back to you the check you had given on the Deshler bank?

A. Yes.

Q. After conferring with Mr. Outhwaite, was that?

A. Yes.

Mr. OUTHWAITE: He don't know that.

Q. What time of day was it, Mr. Field, before this conversation was concluded and they telephoned their attorney and they had surrendered the Deshler check and you had given these other two checks—how late in the afternoon?

A. I do not think I got back that other check until the next morning; I did not hear anything further about that until the next day, I believe; I just left the other checks up there with them.

Q. You think you left the two checks there?

A. I think I did; that is my recollection that I did.

Q. Now, on the following day when the City Deposit bank surrendered——

A. I want to think this thing over; I may be wrong about that statement on that check; let me think; it is so far back.

And thereupon a recess was taken until 1:30 p. m. of same day.

Afternoon Session, March 3, 1902.

And also, JOHN FIELD, resuming the stand for further examination in chief, testified as follows:

Examined by Mr. STEELE:

Q. Let us go back a moment, Mr. Field. You went to the
29 City Deposit bank about two o'clock on the afternoon of the tenth and had this conversation with Mr. Jennings; you took to him what papers?

A. I took to him a check on the Deshler national bank for $3714.24 and one on the Capital City bank for $1161.74.

Q. You did also take back to him the check that you had drawn on Reinhard & Company?

A. I am not sure whether I took that back to him or whether I kept it in my possession; I have forgotten which; I had it with me.

Q. You had it with you?

A. I do not know whether I took it back or not.

Q. Was the amount of that check the same as the check upon the Capital City bank?

A. It was.

Q. Then on the next day he returned to you what?

A. Either the next day or later in the afternoon he returned to me my check on the Deshler national bank for $4875.98, it is the same as the total of these two.

Q. That is to say, as I understand you—I take it for granted you inadvertently before mentioned the wrong amount of the Deshler check——

A. I think I stated the first check I sent up there was $3713; it should be $4875.98; that is the only difference in the amounts.

Q. Then as I understand you, you had sent to the City Deposit bank by messenger at noon on the tenth, a check in their favor drawn on the Deshler bank for forty-eight hundred and some dollars?

A. Yes.

Q. That was subsequently taken up by one check for thirty-seven hundred and something on the Deshler bank——

A. Yes.

Q. And a check for eleven hundred and something on the Capital City bank?

A. That is right.

Q. The check for eleven hundred and something on the Capital City bank representing a part of the moneys at that time due from the clearing house to Reinhard & Company?

A. Yes.

Q. You applied that much of the Reinhard & Company money to the payment of the debt Reinhard & Company owed the Capital City bank?

(Question objected to by the defendant as assuming facts not in evidence.)

Q. I will change the form. You applied, then, as I understand you, to the debt owing to the Columbus clearing house, the City Deposit debt, a part of the money owing by the Columbus clearing house to Reindard & Company, and your reason for doing that was that Reinhard & Company were indebted, were they not, upon your check upon them in favor of the City Deposit bank?

(Question objected to by the defendant as argumentative and

assuming facts not in evidence; objection sustained; exception by the plaintiff.)

Q. At the time you went to the City Deposit bank, Mr. Field, was there or was there not to the credit of Reinhard & Company upon the books of the clearing house twenty-one hundred dollars or thereabouts?

A. There was.

Q. Now, what reason, if any, did you give Mr. Jennings, or can you now give the jury for applying a part of that to the credit of the City Deposit bank?

A. Well, my reason was because my check on the Reinhard bank to the City Deposit bank was returned to me.

Q. Yes; that is, Reinhard & Company had failed to meet
31 that obligation of the City Deposit bank?

A. Yes.

Mr. OUTHWAITE: Not of the City Deposit bank but of the clearing house?

WITNESS: I am not speaking of the City Deposit bank; if I said that I did not mean it because the clearing house deals directly with the banks; the banks have no connection with each other, that is credits or debits, except with the clearing house.

Q. Let us get this distinctly understood. There was owing to Reinhard & Company twenty-one hundred dollars, or thereabouts?

A. Yes.

Q. You paid eleven hundred and some dollars of that to the City Deposit bank, that is true, isn't it?

Mr. OUTHWAITE: He has not stated so.

(Question objected to by the defendant; objection overruled; exception by the defendant.)

WITNESS: Well, if you consider me giving the City Deposit bank a check for that amount, I suppose that would be it.

Q. And the balance was how applied?

(Question objected to as immaterial; objection sustained.)

Q. Now, Mr. Field, have you narrated the whole conversation between yourself and Mr. Jennings on that afternoon?

A. Yes; I am not positive whether I said anything to him or not; I had it in my mind to say that; I don't know whether I said that much to him or not.

Q. You certainly had some conversation with him, didn't you?

A. It runs in my mind; I can not remember now that I
32 told him that I wanted to substitute those and that he asked me what for and I told him not to ask any questions—I am not sure about that—that I wanted to substitute those checks.

Q. And did he ask you why it was best for him not to ask any questions about that transaction?

A. I am not sure; I don't think he did; I am not sure whether

I told him that; I have forgotten which way I did do it; it is so long ago; I can not get my memory to work on it.

Q. And you have no recollection now as to whether or not you and he discussed the Reinhard failure; how bad it was?

Mr. THURMAN: We object to the question because the testimony shows that this transaction—this check was put in and the Deshler check was given on the ninth of April.

Q. When was this conversation with Mr. Jennings, after the assignment of Reinhard & Company?

A. It was between two and three o'clock.

Mr. THURMAN: The original Deshler check was given on the ninth.

Mr. STEELE: We are drawing his attention to a conversation that occurred after Reinhard & Company assigned.

Q. Do I understand you to say, Mr. Field, that the matter of one of the banks having failed that day was not mentioned between you and Mr. Jennings during that interview?

A. I say I am not sure; I could not recall it.

Q. You were quite clear before dinner on that point, were you not?

A. Yes, sir; I thought I knew.

33 Q. What is your best impression?

A. I had two things in mind to do and I don't know which one I did.

Q. Now can you tell the jury why you said to him in case you did say that, that he better not ask any questions about that transaction?

(Question objected to by the defendant as assuming facts not in evidence; objection overruled.)

WITNESS: What is the question?

(Question read.)

WITNESS: Well, the least said about a matter of that kind I think the better.

Q. Why?

A. Well, it is a case where those matters would better not *to* be stirred up, I think, that while they were perfectly right in my mind that——

Q. You thought you were skating on thin ice, didn't you, John?

A. Well, not exactly; no, no.

Cross-examination.

By Mr. OUTHWAITE:

Q. Turn to the ninth of April in your book (here witness does as requested). What amount of checks did the City Deposit bank

bring to the clearing house that day, or what was the amount found due them?

A. The balance due them was $10,245.63.

Q. On the ninth of April?

A. Yes, on the ninth.

Q. From whom was it due to them?

A. From the clearing house.

Q. How did the clearing house arrange that amount with them?

A. Well, I issued a check on Reinhard & Company for $1161.74; on the Capital city bank for $9083.89, making the total.

34 Q. According to the rules of the clearing house how long have they to present those checks and still be duly diligent?

(Question objected to by plaintiff as calling for a conclusion and not the best evidence.)

Q. Do you know what the rule is?

A. I know the substance of it.

Q. What is the substance of it?

Mr. STEELE:

Q. It is a printed rule, isn't it?

A. Yes, a printed rule.

Mr. STEELE: The rule is the best evidence of the contents.

The COURT: Where is the rule?

A. I have not a set of rules; I think I let some of you have a set one day; if you have it here you can read it. (Here Mr. Outhwaite submits book of rules to the witness.) "The presentation of checks on banks, members of this association, by the clerks, on the next succeeding business day after the receipt of same, shall be considered due diligence."

Q. Then the presentation of the check which you issued to the City Deposit bank on the ninth of April being brought back to the clearing house the next day, or presented to the bank the next day would be presented with due diligence?

(Question objected to by the plaintiff as calling for a conclusion; objection overruled; exception by the plaintiff.)

WITNESS: Yes, sir.

Q. Now, do you know what became of that clearing house check which you issued on the ninth of nine hundred dollars;

35 what became of it?

A. You mean for eleven hundred dollars?

Q. For eleven hundred; yes.

A. $1161.74.

Q. Do you know what became of that check?

A. Issued on the ninth?

Q. Yes.

A. You want me to recite the transaction?

Q. Yes, was it not presented to the clearing house the next day at noon?

A. That was presented to the clearing house and by their messenger taken down to the Reinhard & Company bank with their checks with the other banks.

Q. Not too fast in point of time. It was presented to the clearing house?

A. Yes.

Q. Along with all the other checks which the City Deposit bank brought to the clearing house?

A. Yes.

Q. What did you do after it was presented with these other checks; what did you do with regard to giving a check to the City Deposit bank?

A. Well, I made out my balance and gave a check to the City Deposit bank for their balance of $4875.98 on the Deshler national bank.

Q. Your books show, does it not, that the clearing house at that time owed the City Deposit bank forty-eight hundred and some odd dollars?

A. Yes.

Q. In order to settle that difference you gave them a check on the Deshler national bank?

A. Yes.

Q. That was at the meeting of the clearing house on April tenth?

A. Yes.

Q. Does your books show how much the Capital City bank was owing to the clearing house?

A. Yes.

36 Q. How much was the Capital City bank owing to the clearing house?

A. $7184.05.

Q. How much was the Deshler bank owing to the clearing house?

A. $13,407.26.

Q. Now, it was in your discretion to give the City Deposit bank a check on any bank that owed the clearing house, was it not?

A. Yes, sir.

Q. And in the exercise of that discretion you gave the messenger to the City Deposit bank a check on the Deshler national bank?

A. Yes, sir.

Q. At that time the City Deposit bank was doing business at the corner of Swan street and High, was it not?

A. Yes, sir.

Q. Very nearly or quite a mile away from the clearing house?

A. Yes, sir.

Q. In the questions by counsel for plaintiff the word "money" oc-

curs several times put to you; was there any money in the clearing house?

A. No, sir.

Q. Do you pay any debts in money?

A. No, sir; only the debts for expenses of running the clearing house, that is all.

Q. Now, what was that practice called, taking up checks that were brought you by the messenger of the City Deposit bank and giving them a check on the Deshler bank for the amount found due the City Deposit bank; what do you call that transaction? Wasn't it the clearing of the checks?

A. It was clearing, yes.

Q. Then, as a matter of fact, you did clear the check that the City Deposit bank brought to you upon the Reinhard bank?

A. Yes, sir.

37 Q. I call your attention to that because you were led to say, in reply to a question of counsel on the other side, that you did not clear that check that day.

(No reply.)

Q. Well, some time after that you got some information in regard to the Reinhard bank, did you not, some time on that same day you got some information as to the financial condition of the Reinhard bank?

A. Yes, sir.

Q. How long was that after the checks of the City Deposit bank had been cleared and the City Deposit bank had received its check on the Deshler bank?

A. You mean the representative of the City Deposit bank?

Q. Yes; how long after the checks brought by the City Deposit bank had been cleared and the representative of the City Deposit bank had departed with the clearing house check on the Deshler national bank, was it that you heard of the bad financial condition of the Reinhard & Company bank?

A. I should say about a half an hour.

Q. That was the first information you had of the insolvency of the Reinhard bank?

A. It was.

Q. Now, you have told about Reinhard & Company sending back to the clearing house the checks which had been given to their messenger?

A. Yes.

Q. When did the messenger of Reinhard & Company bring back those checks?

A. About one o'clock, as near as I can guess it.

Q. Now, what did you do with those checks?

A. I took the amount——

Q. First the checks, what was done with the checks?

38 A. The checks were returned to the different banks that cleared them.

Q. For instance, if the Deshler bank had cleared any checks on Reinhard & Company you sent those checks back to the Deshler bank?

A. Yes, sir.

Q. But when you came to one which the clearing house had drawn the day before it looked as if the clearing house was in the pocket; there was not anybody to return it to but the clearing house?

A. I suppose eventually there would not have been; no.

Q. You suppose?

A. Eventually there would not have been; of course it was a clearing house check.

Q. And it was properly returnable to the clearing house, was it not?

A. It was returnable to the City Deposit bank and from there to the clearing house.

Q. When a bank brings its checks to the clearing house and presents them through its messenger and those checks are cleared and it receives a check, if there is any owing it, its business ordinarily for that day is done with the clearing house?

A. Yes, sir.

Q. And that was the case with the City Deposit bank that day, was it not?

A. Yes.

Q. Now, the subsequent transactions which you have narrated were done with a view to extricating the clearing house from the difficulty that they were in, Mr. Field?

A. Well, I don't know exactly as that was the case; I don't know whether I had that in mind; whether to extricate the clearing house and its different members.

39 Q. At the time you gave the messenger of the City Deposit bank the check on the Deshler national bank, neither you nor the City Deposit bank nor the Deshler national bank, so far as you are informed, knew any thing about the assignment of Reinhard & Company?

(Question objected to by the plaintiff for the reason that he can not tell what the knowledge of other people was; objection overruled; exception by the plaintiff).

WITNESS: To my knowledge they did not know anything of it, and I do not think they did either because they would not have sent their checks to the clearing house if they had known the bank had failed.

And thereupon the plaintiff moved to strike out the above answer.

Mr. OUTHWAITE: You can strike out the reason.

And thereupon the court sustained the motion of the defendant to strike out the latter part of the answer, beginning with the words "and I do not think they did either," and so forth.

(And thereupon the plaintiff moved to strike out the balance of the answer; motion overruled; exception by the plaintiff.)

Q. The Deshler national bank that day was solvent?
A. Yes.
Q. The Capital City bank was solvent?
A. Yes.
Q. Your transaction with the City Deposit bank later in the afternoon was this, was it not: That you gave the City Deposit bank through Mr. Jennings, its cashier, a check on the Capital City bank and another check on the Deshler national bank, both of which added together amounted to the same as the check you had previously given the City Deposit bank on the Deshler national bank?
A. Yes, sir.
Q. Mr. Jennings had no information at that time as to whether either of these checks were drawn on any balance due to Reinhard & Company, had he; he had received no information from you at that time as to whether either of these two checks were drawn on any balance due Reinhard & Company?

(Question objected to by the plaintiff; objection overruled; exception taken by the plaintiff).

WITNESS: Well, as I said before, I think that I did not tell him; I am not sure.

Redirect examination.

By Mr. STEELE:

Q. Now, Mr. Field, to avoid any misunderstanding, do you still claim to have in your hands $2100 subject to the order of the trustee of Reinhard & Company?
A. That I have?
Q. Yes.
A. No.
Q. Or have you paid it out?
A. It has been disposed of.
Q. Yes.
A. Yes.
Q. In the way you have described?
A. Yes.
Q. Let me ask you another question; at the time you sent this first check upon the Deshler national bank to the City Deposit bank you included in it the check on Reinhard & Company which had not been paid?
A. Yes.

(Question objected to by the defendant.)

Q. Isn't that true?

41 Mr. OUTHWAITE: He disclaimed that in their examination, and we asked no further question.

A. Just read that again.

(Objection overruled.)

(Question read.)

A. No; from the fact that we do not include any separate check in the balance made out at all; there are balances between the banks and no separate check is noticed at all in making out the balances.

Q. Oh, well, Mr. Field, in getting at the amount of that check you counted as not paid, or worthless the Reinhard check, did you not?

A. Yes.

Q. Now, why was that done, because it had been refused payment?

A. Now, you are on another question entirely; the first question you asked me about the original check that I sent up.

Q. Yes.

A. Then I did not know anything about this check coming back when I gave that check, and of course it would not be included in it.

Q. On the 9th you gave the City Deposit bank a check on Reinhard & Company for eleven hundred and some dollars?

A. Yes.

Q. On the 10th you gave them a check on the Deshler national bank for $4800 and some odd dollars?

A. Yes.

Q. Subsequently you took up that forty-eight hundred dollar check by a check for thirty-seven and another for eleven?

A. Yes.

Q. Isn't it true, therefore, that in the forty-eight hundred dollar check, arriving at that balance you must have regarded the fact that your previous check on Reinhard & Company's bank would not be paid?

A. No; that does not follow.

42 Q. Otherwise you would not have owed them that much?

A. No; that does not follow; I can explain it to you if you want me to.

Q. Go ahead.

A. We will suppose that the City Deposit bank came——

Q. Let us stick to this case here.

A. I want to show you where you are wrong in your question that is all; we will suppose they came to the clearing house and were debtor instead of creditor to the clearing house; then I would have had to give that check which you claim Reinhard's $1100 was in, the balance check to some other bank; there are no amounts except the balances recognized in the clearing house; no individual checks are recognized by me at all; I do not know what go through, only the totals; I do not know what goes through at all; I was even unaware of that check coming through when I made that balance

check of $4800; did not know whether it had come through or been cashed direct the day before or in the morning.

Q. Then why did you change the check on the Deshler national bank?

A. Because that check came back to me later in the day.

Q. It was not included in this $4800 item?

A. No.

Q. So you still owed them the $4800 which you had given them for and $1100 more on account of this Reinhard check not being paid?

A. No; $4800 was the exact amount of their balance, and if they were to pay this $1100 that came back, why it was to come out of that $4800, going on that supposition.

43 Q. The balance of $4800 is arrived at upon the theory or supposition as their check upon Reinhard would be paid or was paid, is that right?

A. I did not have any theory or supposition; it was paid when I made that balance; it was paid so far as I know.

Q. Now, if that is true, when that check came back unpaid or dishonored, then they were entitled to $1100 from Reinhard & Company some way or other?

A. Yes; it was endorsed made payable to the City Deposit Company and made payable to them.

Q. That would not affect their balance of $4800 any, would it?

A. No; their balance in the clearing house would still be $4800.

Q. Why wouldn't they keep that check on the Deshler for $4800 irrespective of whether Reinhard's check was paid or unpaid that day?

A. Well, they did not do it because I took them two other checks to make them this same amount.

Q. Then the fact that this check drawn on Reinhard was unpaid cut no figure in arriving at their balance at all, the balance remained the same?

A. The balance remained the same, yes.

Q. That is at noon when you drew the check for $4800 the Reinhard check was treated as paid?

A. Hold on here, let us see, no.

Mr. OUTHWAITE: He has not said so.

A. After deducting that $1100 from the City Deposit bank, of course, that would leave them a balance of $3714.

Q. At the time you drew the check for $4800 though, the Reinhard check was treated as paid?

A. Yes.

44 Q. The fact that it was unpaid would have increased the amount due the City Deposit bank, would it not?

A. Increase the amount due the City Deposit bank?

Q. Yes.

A. No; it would decrease it.

Q. Decrease it because your clearing house check to them would

cease to be an asset? A. It would make my clearing house check that much less.

Q. And reduce the debt of the clearing house to $3700 and something?

A. Yes.

Q. That was all the clearing house owed them then, was the $3700, was it not, Mr. Field?

(Question objected to as leading.)

A. After deducting the Reinhard check that was returned the clearing house only owed them $3714.

Q. Therefore, you were entitled, as I understand, so far as the clearing house was concerned, you were entitled to have surrendered that $4800 check and substitute another for $3700, the true balance?

(Question objected to by the defendant; objection overruled; exception by the defendant.)

A. That was a question in my mind, in doubt in my mind, if it had been an individual check I would say yes, it was a clearing house check though, and it was a question in my mind whether or not they were entitled to that $1100.

Q. They were not entitled, of course, to it from you personally?

A. Well, that was the question in my mind whether they were entitled to it from me as that was in payment of a clearing house check of the day before.

Q. Now the clearing house is not a corporation, is it?

A. No.

45 Q. Or a partnership?

A. I do not know whether you would call it a partnership or not; it is an association.

Q. You are employed by a number of banks?

A. Yes.

Q. An association to gather in the different checks they bring up and strike the balance and adjust them, etc., that is about it, isn't it?

A. Yes.

Q. You have no moneys in your possession?

A. No.

Q. If the City Deposit Company, for example, has a credit of two thousand or three thousand dollars, you would pay that by giving a check on some other bank which was short that day at the clearing house, or on two or three banks until you got enough?

A. Yes.

Q. And did you or not have authority on that day to draw a check as by the bank itself upon any member that was short to make his balance good?

A. I did.

Q. That is to say upon a certain day Reinhard & Company or any other bank came to the clearing house and the stuff they

brought there was less than the stuff cleared on them, you were authorized not to go to the bank and have them draw a check, but to draw the check for them to make that difference?

A. Yes.

Q. Have those checks any special form?

A. Yes; they are called clearing house checks; they are printed so, Clearing House at the head of them.

Q. And how are they signed?

A. Signed by me as manager.

Q. It is no part of your contract or arrangement with these banks that you are to be personally liable for the failure of any bank to meet a check drawn by you on it, is it?

A. No.

46 Q. Part of the assets or checks brought to the clearing house by the City Deposit bank which caused them to have a balance of $4800 to their credit consisted of this clearing house check on Reinhard & Company for $1100?

A. Yes, sir.

Q. And that check turned out to be no good?

A. Yes.

Q. It was dishonored; that then reduced the balance in the clearing house of the City Deposit bank to what sum?

(Question objected to; objection overruled.)

A. $3714.74.

Q. And it left Reinhard & Company's bank owing that bank eleven hundred and some odd dollars; have you got the exact amount there?

(Question objected to as assuming facts not in evidence; objection overruled.)

(Question read.)

A. Either owing that bank or the clearing house.

Q. Reinhard & Company was not owing the clearing house at the time, were they, because the clearing house were owing them, were they not, twenty-seven hundred and odd dollars?

A. If they owed the clearing house $1120 then it left the clearing house owing Reinhard $970.45, the difference.

Q. You carried on your books as the clearing house owing them twenty-seven hundred dollars, didn't you?

A. Yes.

Q. Now, as reflecting upon that, Mr. Field, all the other checks cleared that day on Reinhard & Company were returned to

47 the banks that sent them in, were they not?

A. Yes, sir.

Q. They were not passed to their credit by the clearing house?

A. They were returned to the clearing house by Reinhard & Company.

Q. What did the clearing house do?

A. Then the clearing house took the amounts of those checks from the clearings—clearings for the different banks that day and returned them to the banks.

Q. And made the credits that much less to the several banks?

A. Yes.

Q. That was true of the defendant as any other bank?

A. Yes.

Q. Was there any action taken by the clearing house on that day as to how those checks cleared on Reinhard & Company should be treated?

A. Well, our rules cover that.

Q. What rule is that, Mr. Field? Just find it and read it.

A. "In case of failure to respond promptly"—this has not reference to it, but it is further on in this same article—"In case of failure to respond promptly to the checks of the manager, on the part of any member of the association, they shall be immediately returned to the manager who shall call upon the other banks or bankers to make up the sum for which payment has been refused in proportion to the amount of checks upon the defaulting member sent into the clearing house at the preceding settlement, which sums so furnished or contributed shall constitute claims in the hands of the responding members respectively against the defaulting
48 members, and it is hereby agreed that the checks received from the clearing house by the defaulting members, shall be delivered, if required, to the member owning the same without mutilation; the agency of the clearing house in the matter, it is understood, is only as a trustee, and in no case is the association to be held responsible for any loss that may occur."

Q. Is that the only rule on the subject?

A. Yes.

Q. If you had consulted that rule, Mr. Field, you would have relieved your mind as to whether or not the clearing house would be responsible on that question, would you not?

(Question objected to by the defendant; objection overruled.)

A. Well, I suppose I might.

Q. At the time you sent the messenger down or at the time Reinhard & Company's messenger took down the checks to the bank, did you know that the bank had suspended?

A. No.

Q. Did you learn it upon his return?

A. Upon his return was my first intimation.

Q. That you say was about 1 o'clock?

A. About 1.

Q. You learned it from no other source in the meantime?

A. No.

Q. You had not heard the newspaper boys crying it?

A. No; I am in a back room up there in the board of trade and I could not hear anything there.

Q. Between the time you came down stairs and the time you got up to the City Deposit bank, did you learn it as common knowledge?

A. I do not understand you.

49 Q. I say between the time that you left the room at the Board of Trade building and got to the City Deposit bank, did you ascertain whether or not the fact of the assignment had become generally known throughout the city?

A. No; I did not.

Q. You are uncertain now whether you communicated that fact to Mr. Jennings or not that the bank had assigned?

A. I am not sure; I think not; but I am not sure.

Q. Do you know whether he knew it or not?

A. It is my impression that he did not.

Q. How did you gain that impression, did he say anything on it?

(Question objected to by the defendant; question withdrawn.)

Q. Do you recollect what reason, if any, was given by Mr. Jennings for desiring to consult his attorney before agreeing to this substitution of checks?

(Question objected to by the defendant as being in the nature of cross-examination and also as repetition; objection overruled; exception by the defendant.)

A. I do not think he gave any, is my recollection of it.

Q. How long were you at his bank?

A. Probably about five minutes, just a few minutes.

Q. Did he talk to Mr. Outhwaite while you were waiting, or do you recollect?

(Question objected to by the defendant; objection overruled; exception by the defendant.)

A. I think not.

Q. You said the only money you handled was money paid out for expenses?

A. Yes.

50 Q. Those expenses I suppose include rent, your salary and items of that kind?

A. Yes.

Q. How is the money gotten together for that purpose?

A. It is assessed on the different members of the clearing house pro-rata of the amounts that they clear for each six months.

Q. At that time Reinhard & Company and the City Deposit were both members of this clearing house, as I understand?

A. Yes.

And also, FRED C. RECTOR, called on his own behalf, being duly sworn, testified as follows:

Examined by Mr. STEELE:

And thereupon, it was admitted for the purposes of this trial that on the tenth day of April, 1900, Reinhard & Co. was composed of only John G. Reinhard and Henry A. Reinhard, partners; that Reinhard & Company and John G. Reinhard and Henry A. Reinhard were each on that day insolvent, and that on the tenth day of August, 1900, they were adjudged by the United States court bankrupts; that on 12:15 on the tenth day of April, 1900, John G. Reinhard and Henry A. Reinhard made an assignment of all their property in the probate court under the insolvent law of the State of Ohio; and that the petition in bankruptcy was filed on the eleventh day of April, 1900.

Q. You are the trustee of Reinhard & Company?

A. Yes, sir.

51 Q. And such trustee of the individual estates of the members?

A. Yes.

Q. You are familiar with the assets and liabilities of Reinhard & Company?

A. I think so.

A JUROR: Speak a little louder.

A. I think so.

Q. How much of a dividend has been declared and paid to general creditors of Reinhard & Company up to this time?

(Question objected to by the defendant; objection overruled; exception by the defendant.)

A. 15 per cent. has been declared and paid to the creditors of Reinhard & Company.

Q. Have you the means of knowing and are you able to state what percentage will be paid eventually to general creditors of Reinhard & Company?

(Question objected to by the defendant; objection overruled; exception by the defendant.)

A. I can answer that only approximately and by way of estimation, if you want that answer.

Q. Wh-t is it?

A. I should judge that another dividend perhaps of ten per cent. will be paid, not to exceed that; I would rather say it would be under ten per cent., making the total 25 per cent.

Q. How many creditors are there in number?

A. Creditors of Reinhard & Company number about 500.

No cross-examination.

And thereupon the plaintiff rested.

And thereupon counsel for the defendant moved the court to arrest the testimony from the jury and to render judgment in favor of the defendant.

52 And thereupon the court sustained said motion to arrest the testimony from the jury and rendered judgment dismissing the plaintiff's action and petition at his costs, to which ruling and judgment of the court in sustaining said motion as aforesaid the plaintiff excepted.

And thereupon, within three days thereafter the plaintiff filed his motion for a new trial, which said motion for a new trial appears among the court papers on file in this case.

And thereupon, the court overruled said motion for a new trial, to which ruling of the court in overruling said motion for a new trial and in entering up judgment as aforesaid the plaintiff at the time excepted, and still excepts, and presents this, his bill of exceptions, and prays that the same may be allowed, signed, sealed and filed as a part of the record in said cause, but not spread at large upon the journal according to the statute in such case made and provided, all of which is accordingly done as of said term this nineteenth day of March, A. D. 1902.

D. C. BADGER, Judge.

This bill of exceptions is correct.

OUTHWAITE, LINN & THURMAN,
Attorneys for Defendant.

March 19, 1902.

53 In the Supreme Court of Ohio, January Term, A. D. 1904.

THE STATE OF OHIO, City of Columbus, } ss:

Certified Transcript of Docket and Journal Entries.

In the record and proceedings then and there had and held, among other things, is the following, to-wit:

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error, *vs.* THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Incorporated, and Existing under the Laws of the State of Ohio, Defendant in Error.	No. 8162. Error to the Circuit Court of Franklin County.

Nov. 1, 1902. Petition in error and waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers and bill of exceptions filed.
" 12, " Papers taken by F. B. Toothaker.
" 19, " " returned by F. B. Toothaker.
" " " Printed record filed. 11/20/02, Proof of service filed.

Jan'y 23, 1903. Plaintiff's printed brief filed. 1/26/03, Proof of service filed.

Apr. 13, " Defendant's printed brief and proof of service filed.

May 22, " Plaintiff's printed reply brief filed. 5/25/03, Proof of service filed.

Sept. 10, " Printer's receipted bill ($20.00) filed.

Nov. 24, 1903. Judgment affirmed,—Journal entry:

This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Ordered, that a special mandate be sent the court of common pleas of Franklin county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the circuit court of Franklin county, "for entry."

Journal No. 19, pg. 308.

Dec. 1, 1903. Mandate issued.

" " " Original papers sent clerk.

Nov. 30, 1904. Entry of certification filed. Journal entry: On motion of the plaintiff in error, Fred C. Rector, trustee, this court orders it to be certified and made part of the record in this case, and the Honorable William T. Spear, chief justice of said supreme court, does now certify, that in said cause, and on the hearing before this court, it was

54 claimed, contended and alleged by the said plaintiff in error that, on the 10th day of April, A. D., 1900, Reinhard & Company, a partnership, by deeds of its individual members committed an act of bankruptcy, to-wit: made a general assignment for the benefit of creditors; that on the 11th day of April, A. D., 1900, a petition in bankruptcy was filed in the district court of the United States of the southern district of Ohio, eastern division; that on the 10th day of August, A. D. 1900, said Reinhard & Company were, by said court, adjudged bankrupt, and on September 13, A. D., 1900, said plaintiff in error was appointed trustee thereof; that on the 10th day of April, A. D., 1900, said Reinhard & Company, then being to the knowl-

edge of the defendant in error, insolvent, assigned and transferred to the defendant in error, The City Deposit Bank Company, and that the said last named company, then and there, received from said Reinhard & Company, the sum of $1161.74 of monies belonging to said Reinhard & Company; that said assignment and transfer was an unlawful preference, given to the said defendant in error, and violated the provisions of section 60*a* and section 60*b* of the United States bankrupt law; that it became and was material to the said cause for this court to determine whether the said sum of $1161.74 was so assigned and transferred; whether it was an unlawful preference; whether it was a violation of said section 60*a* and section 60*b* of the said bankrupt law; and whether the said plaintiff in error, under said law, was entitled to have the said assignment and transfer set aside and declared null and void, and to have a judgment and order for the recovery of said money against said defendant in error; that the decision of this court was adverse to the claims and contention of the said plaintiff in error, in this, that said court decided that said assignment and transfer of said sum of $1161.74 was not an unlawful preference, in violation of the said provisions of the bankrupt law, and that the said plaintiff in error was not deprived of any right under said law, and was not entitled to have said assignment and transfer set aside, and to recover the said sum of $1161.74 from said defendant in error.

Journal No. 20, p. 83.

Nov. 30, 1904. Petition for writ of error filed.
" " " Bond filed. (In duplicate)
" " " Citation filed.
" " " Acknowledgment of receipt of copy of citation by attorneys for defendant in error filed.
" " " Writ of error filed.
" " " Assignment of errors filed.

55 The Supreme Court of the State of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Incorporated, and Existing under the Laws of the State of Ohio, Defendant in Error. } 8162.

Certificate.

On motion of the plaintiff in error, Fred C. Rector, trustee, this court orders it to be certified and made part of the record in this case, and the Honorable William B. Spear, chief justice of said supreme court does now certify, that in said cause, and on the hearing before this court, it was claimed, contended and alleged by the said plaintiff in error that, on the 10th day of April, A. D. 1900, Reinhard & Company, a partnership, by deeds of its individual members committed an act of bankruptcy, to-wit:—made a general assignment for the benefit of creditors; that on the 11th day of
56 April, A. D. 1900, a petition in bankruptcy was filed in the district court of the United States of the southern district of Ohio, eastern division that on the 10th day of August, A. D. 1900, said Reinhard & Company were, by said court, adjudged bankrupt, and on September 13, A. D. 1900, said plaintiff in error was appointed trustee thereof; that on the 10th day of April, A. D. 1900, said Reinhard & Company, then being to the knowlege of the defendant in error, insolvent, assigned and transferred to the defendant in error, The City Deposit Bank Company, and that the said last named company, then and there, received from said Reinhard & Company, the sum of $1161.74 of monies belonging to said Reinhard & Company; that said assignment and transfer was an unlawful preference, given to the said defendant in error, and violated the provisions of section 60*a* and section 60*b* of the United States bankrupt law; that it became and was material to the said cause for this court to determine whether the said sum of $1161.74 was so assigned and transferred; whether it was an unlawful preference; whether it was a violation of said section 60*a* and sectio- 60*b* of the said bankrupt law; and whether the said plaintiff in error, under said law, was entitled to have the said assignment and transfer set aside and declared null and void, and to have a judgment and order for the recovery of said money against said defendant in error; that the decision of this court was adverse to the claims and contention of the said plaintiff in error, in this, that said court decided that said assignment
57 and transfer of said sum of $1161.74 was not an unlawful preference, in violation of the said provisions of the bankrupt law, and that the said plaintiff in error was not deprived of any right under said law, and was not entitled to have said assignment

and transfer set aside, and to recover the said sum of $1161.74 from said defendant in error.

WILLIAM B. SPEAR,
Chief Justice Supreme Court of the State of Ohio.

58 The Supreme Court of the State of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Incorporated, and Existing under the Laws of the State of Ohio, Defendant in Error. } No. —.

Petition for Writ of Error.

The petition of Fred C. Rector, trustee of Reinhard & Company, by Pugh & Pugh, and Fred C. Rector, his attorneys, hereby sets forth that on or about the 24th day of November, 1903, the supreme court of the State of Ohio made and entered a final order and judgment herein, in favor of the City Deposit Bank Company, above named, in which final order and judgment, and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the said Fred C. Rector, trustee, all of which will more in detail appear from the assignment of errors which is filed with this petition.

59 That the said supreme court of the State of Ohio is the highest court of the said State of Ohio in which a decision in this suit and in this matter could be had.

Wherefore, the said Fred C. Rector, trustee, as aforesaid, petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the supreme court of the State of Ohio for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 14th day of November, A. D., 1904.

FRED C. RECTOR,
Trustee, Petitioner.
By PUGH & PUGH,
D. F. PUGH, &
FRED C. RECTOR,
Attorneys.

The writ of error as prayed for, in the foregoing petition, is hereby allowed, this 14th day of November, A. D., 1904, the writ of error to

operate as a supersedeas, and the bond for that purpose is fixed at $500.00.

Dated at Columbus, this 14th day of November, A. D., 1904.

WILLIAM B. SPEAR,
Chief Justice Supreme Court of the State of Ohio.

Filed in my office this — day of November, A. D., 1904.

——— ———,
Clerk of the Supreme Court of the State of Ohio.

60 The Supreme Court of the State of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Incorporated, and Existing under the Laws of the State of Ohio, Defendant in Error. } No. —.

Bond.

Know all men by these presents, that we, Fred C. Rector, trustee of Reinhard & Company, and L. L. Rankin, as surety are held and firmly bound unto the City Deposit Bank Company, a corporation, duly organized, incorporated and existing under the laws of the State of Ohio, in the sum of $500.00, to be paid to the said obligee; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, and severally, firmly by these presents.

61 Sealed with our seals and dated this 14 day of November, A. D., 1904.

Whereas the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Ohio:

Now, therefore, the condition of this obligation is such that, if the above named plaintiff in error shall prosecute his said writ of error to affect, and answer all costs and damages in case he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and effect.

FRED C. RECTOR,
Trustee of Reinhard and Company, Bankrupts.
L. L. RANKIN.

STATE OF OHIO, }
County of Franklin. }

On this 14th day of November, 1904, before me, personally appeared Fred C. Rector, trustee as aforesaid, to me known to be the

person described in, and who executed, the foregoing bond, and acknowledged that he executed the same as his free act and deed.

[Notarial Seal, Franklin County, Ohio.]

B. C. BLACHLEY,
Notary Public in and for Franklin County, Ohio.

62 STATE OF OHIO, Franklin County, } ss:

On this 14th day of November, 1904, before me, personally appeared L. L. Rankin, to me known to be the person described in, and who executed, the foregoing bond, and acknowledged that he executed the same as his free act and deed.

[Notarial Seal, Franklin County, Ohio.]

B. C. BLACHLEY,
Notary Public in and for Franklin County, Ohio.

I hereby approve of the foregoing bond and sureties, this 17th day of November, 1904.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

63 THE UNITED STATES OF AMERICA, ss:

To the City Deposit Bank Company, a corporation duly organized, incorporated, and existing under the laws of the State of Ohio, Greeting:

You are hereby cited and admonished to be, and appear, at a Supreme Court of the United States, at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein Fred C. Rector, trustee of Reinhard & Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the chief justice of the supreme court of the State of Ohio, this 14th day of November, 1904.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

Attest:

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk of the Supreme Court of the State of Ohio.

Columbus, Ohio, November 14th, 1904.

Copy of the within citation received this 29th day of November, A. D., 1904, by the undersigned, attorney of record for the defendant in error, The City Deposit Bank Company.

TALFOURD P. LINN.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Incorporated and Existing under the Laws of the State of Ohio, Defendant in Error. } No. —.

THE UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of Ohio, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Fred C. Rector, trustee of Reinhard & Company, and the City Deposit Bank Company, a corporation, duly organized, incorporated and existing under the laws of the State of Ohio, wherein was drawn in question the validity of the bankrupt statute of the United States of 1898, and also the construction of said statute, and the decision was against the validity of the
66 said statute, and against the right, title, and privilege set up and claimed under said statute, a manifest error hath happened, to the great damage of the said Fred C. Rector, trustee as aforesaid, as by his claim plainly appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, and with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 14 day of December, 1904, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws in question of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26 day of November, in the year of our Lord, 1904.

[Seal United States District Court, Southern Dis. Ohio.]

B. R. COWEN,
Clerk of the District Court of the United States
for the Southern District of Ohio.

67 The Supreme Court of the State of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE CITY DEPOSIT BANK COMPANY, a Corporation Duly Organized, Incorporated, and Existing under the Laws of the State of Ohio, Defendant in Error. } No. —.

Assignment of Errors.

Now comes the said plaintiff in error, Fred C. Rector, trustee as aforesaid, and in connection with the petition for a writ of error herein, respectfully submits that in the record, proceedings, decision, and final judgment of the supreme court of the State of Ohio, in the above entitled matter, there are manifest errors, to-wit:

First. Said supreme court erred in deciding, as it did, that the assignment, transfer and payment of $1161.74 to the said The
68 City Deposit Bank Company, on the 10th day of April, A. D., 1900, by the clearing house of Columbus, for Reinhard & Company, was not a preference, in violation of the terms and provisions of section 60*a* and section 60*b* of the United States bankruptcy law of 1898.

Second. Said supreme court erred in deciding, as it did, that said Reinhard & Company did not pay, assign and transfer the said sum of $1161.74 to said The City Deposit Bank Company.

Third. That the said supreme court erred in deciding, as it did, that the said clearing house, or the manager thereof, was not clothed with power to pay, assign and transfer said sum of $1161.74 for said Reinhard & Company to the said The City Deposit Bank Company, in the absence of the prohibition of said sections 60*a* and 60*b* of the said bankrupt law.

Fourth. Said supreme court erred in holding, as it did, that the said plaintiff in error had no right, under the provisions of said sections 60*a* and 60*b* of said bankrupt law, to have the said payment, assignment and transfer of the said $1161.74, made aforesaid by the said clearing house, or its manager, for said Reinhard & Company, to said The City Deposit Bank Company, declared null and void, and set aside, and said amount of $1161.74 refunded to said plaintiff in error, by said The City Deposit Bank Company, as a preference, in violation of the provisions of said sections 60*a* and 60*b* of said bankrupt law.

69 Fifth. Said supreme court erred in holding and deciding, as it did, that the common pleas court of Franklin county, Ohio, did not err in its order by which it arrested the testimony from the jury, and rendered judgment for the defendant in error.

Sixth. Said supreme court erred in holding and deciding that the

said common pleas court did not err by making the said order by which the plaintiff in error was deprived of a right of trial by jury.

Seventh. Said supreme court erred in holding and deciding, as it did, that said common pleas court did not err in rendering judgment for the defendant in error.

Eighth. Said supreme court erred in holding and deciding, as it did, that the circuit court of Franklin county, Ohio, did not err in affirming the judgment of the said common pleas court.

Ninth. Said supreme court erred in refusing to reverse the said judgment of affirmance, rendered by the said circuit court, and in its refusal to reverse the judgment of the said common pleas court.

Tenth. Said supreme court erred in deciding, as it did, that because the manager of the said clearing house, before the pay-
70 ment, assignment and transfer of the $1161.74, had notice of the assignment, by Reinhard & Company, of all its property for the benefit of its creditors, his agency, or the agency of the clearing house, for said Reinhard & Company, was thereby terminated.

Eleventh. Said supreme court erred in deciding, as it did, that the requirement of the rule of the clearing house prevented the payment, assignment and transfer of the said sum of $1161.74 to said defendant in error from being an unlawful and voidable preference under the said bankrupt law.

FRED C. RECTOR, Trustee,
By His Attorneys, PUGH & PUGH,
D. F. PUGH, &
FRED C. RECTOR.

71 Supreme Court of the State of Ohio.

STATE OF OHIO, }
City of Columbus. }

I, Lawson E. Emerson, clerk of the supreme court of Ohio, do hereby certify that the foregoing petition for writ of error, bond, citation and acknowledgement of receipt of copy of citation by attorneys for defendant in error, writ of error and assignment of errors in the case of Fred C. Rector, trustee of Reinhard & Company, plaintiff in error, *vs.* The City Deposit Bank Company, a corporation etc., defendant in error; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said supreme court and used in the consideration of said cause, and that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said supreme court this 1st day of December, A. D., 1904.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, Deputy.

72 In the Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus. }

To the honorable the Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named in a certain authenticated transcript to this writ attached, send, as within we are commanded.

In witness whereof, I, Lawson E. Emerson, clerk of the supreme court of Ohio, have set my hand and seal of said court, this 1st day of December, A. D., 1904.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, Deputy.

Endorsed on cover: File No. 19,561. Ohio supreme court. Term No. 137. Fred C. Rector, trustee of Reinhard & Company, plaintiff in error, *vs.* The City Deposit Bank Company. Filed December 12th, 1904. File No. 19,561.

FREE COPY.

No. 137.

~~(19,562)~~

Office Supreme Court U. S.
FILED
DEC 9 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

[redacted]

FRED C. RECTOR, TRUSTEE OF REINHARD & COMPANY,

PLAINTIFF IN ERROR,

vs.

THE CITY DEPOSIT BANK, A CORPORATION DULY ORGANIZED, INCORPORATED AND EXISTING UNDER THE LAWS OF OHIO,

DEFENDANT IN ERROR.

Error to the Supreme Court of Ohio.

Brief for Plaintiff in Error.

PUGH & PUGH,
D. F. PUGH,
FRED C. RECTOR,
Attorneys for Plaintiff in Error.

F. B. TOOTHAKER, Law Printer, 79-89 N. Third St., Columbus, O.

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(19,562)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 138.

FRED C. RECTOR, TRUSTEE OF REINHARD & COMPANY,

PLAINTIFF IN ERROR,

vs.

THE CITY DEPOSIT BANK, A CORPORATION DULY ORGANIZED, INCORPORATED AND EXISTING UNDER THE LAWS OF OHIO,

DEFENDANT IN ERROR.

Error to the Supreme Court of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

I.

THE ISSUES.

Plaintiff in error brought an action, in the Common Pleas Court of Franklin county, against the defendant in

error, to recover the sum of thirteen hundred dollars ($1300.00), with interest thereon from September 13, 1900. (The amount should have been $1161.74.)

The petition shows that plaintiff in error was duly appointed trustee in bankruptcy of Reinhard & Company; that on August 10, 1900, Reinhard & Company were adjudged bankrupts; that the petition in bankruptcy, praying for adjudication in bankruptcy, was filed on April 11, 1900; that on April 10, 1900, Reinhard & Company committed an act of bankruptcy, to wit, made a general assignment for the benefit of its creditors; that on April 10, 1900, Reinhard & Company assigned and transferred to the defendant in error, and the defendant in error received of the moneys belonging to said Reinhard & Company $1300; and then the petition charges that the said payment to the said defendant in error was made with the purpose of giving an unlawful and fraudulent preference to the defendant in error, and for that purpose, was received by said defendant in error; and that said transfer was made to defraud the creditors of said Reinhard & Company. (Page 7 of printed Record.)

The answer of defendant in error admitted the assignment, acceptance and qualification of the plaintiff in error as trustee in bankruptcy of Reinhard & Company, the adjudication of said Reinhard & Company as bankrupts, the incorporation of the defendant in error, and the general assignment made by said Reinhard & Company, for the benefit of its creditors. All other allegations of the petition were denied. (Page 8 of Record.)

II.

THE FACTS.

On the trial of the case, and for the purposes of the trial, it was admitted that on April 10, 1900, Reinhard & Company was composed of John G. Reinhard and Henry A. Reinhard, partners; that Reinhard & Company and John G. Reinhard and Henry A. Reinhard were each, on that day, insolvent; that on the tenth day of August, 1900, they were adjudged by the United States Court bankrupts; that at 12:15 o'clock, on the tenth day of April, 1900, John G. Reinhard and Henry A. Reinhard made an assignment of all their property under the insolvent law of the State of Ohio; and that the petition in bankruptcy was filed on the eleventh day of April, 1900. (Page 30 of the Record.)

On the trial of the case the plaintiff also introduced as a witness, John Field, who testified as follows:

That, in April, 1900, there was in Columbus, Ohio, a clearing house, of which many of the banks of Columbus were members, Reinhard & Company, bankers, the defendant in error, The Commercial National Bank, The Deshler National Bank, and the Capital City Bank being among the number; that on the tenth day of April, 1900, there was a balance due Reinhard & Company from the clearing house of $2132.19 (page 10 of the Record); that he, as manager of the clearing house, divided this balance of $2132.19 between two banks, the defendant in error, and the Commercial National Bank, giving to

the former a check for $1161.74, and to the latter a check for $970.45 (page 10 of the Record); that said balance of $2132.19 was made up of checks which were brought to the clearing house that day, aggregating an equal amount, by Reinhard & Company, which checks were the property of Reinhard & Company, and were drawn on other banks (page 10 of the Record); that these checks were never surrendered to Reinhard & Company (page 11 of Record); that on the previous day, the ninth day of April, 1900, the witness, as manager of the clearing house, issued a check against Reinhard & Company's bank to the defendant in error for the amount of $1161.74, Reinhard & Company then owing the clearing house that amount (pages 11 and 12 of the Record); that on the tenth day of April, 1900, this check was cleared in the clearing house; that is, it was brought to the clearing house by the defendant in error, and, with other checks against Reinhard & Company, aggregating $6369.30, was taken to Reinhard & Company's bank by a messenger of the clearing house, and by him brought back unpaid (page 13 of the Record); that these checks were brought back to him with the information that they were not paid, about one o'clock of that day, and that he "then knew, of course, that Reinhard & Company had made an assignment," the messenger having stated that fact to him when he brought back the checks (page 13 of the Record); that the witness, as manager of the clearing house, made no attempt to distribute the $2132.19 among the creditors of Reinhard & Company, who had checks aggregating $6369.30, but that he merely divided the balance due Reinhard & Company of $2132.19 between the two creditors, the City Deposit Bank and the Com-

mercial National Bank (pages 13 and 14 of the Record); that about two o'clock, one hour after he had been informed that Reinhard & Company had made an assignment, he took the check for $1161.74 to the defendant in error and delivered it to its cashier (page 14 of the Record); that when he delivered the check for $1161.74 to the cashier of the defendant in error, Mr. Jennings, he "told him that the Reinhards had failed, and that this check had been returned, and that I had a balance due Reinhard & Company, and that I would substitute a check on the Capital City Bank for this check on Reinhard, which had been returned," (page 14 of the Record); that Jennings said he would telephone Mr. Outhwaite, and that if it was all right he would return the Reinhard check (page 14 of the Record); that he, as manager of the clearing house, had previously given to the defendant in error a check for $3714.24, on the Deshler National Bank, which represented the balance due from the clearing house to the defendant in error, and that the amount of the check given to the defendant in error the day before on Reinhard & Company for $1161.74 was included in the $3714.24; that the defendant in error surrendered the check on the Deshler National Bank, and in return he gave its cashier a check for the $1161.74 on the Capital City Bank, and the balance of the $3714.24 on some other bank (pages 14 and 15 of the Record); that, upon further reflection, he said he took to the defendant in error, about two o'clock in the afternoon, and on April 10, 1900, a check on the Deshler National Bank for $3714.24, and one of the Capital City Bank for $1161.74, and on the next day the defendant in error, or

its cashier, returned to him the check on the Deshler National Bank for $4875.98, being "the same as the total of these two"; and he corrected his former testimony by saying that instead of stating that the first check sent to the defendant in error was for $3714.24 (incorrectly stated $3913.00), he should have stated it to be $4875.98; that he took up the check for $4875.98 on the Deshler National Bank, that is, the cashier of the defendant in error surrendered it to him, and then he gave the cashier a check for $1161.74 on the Capital City Bank, and for the balance of the $4875.98 he gave the defendant in error a check on the Deshler National Bank (pages 15 and 16 of the Record; that the check for $1161.74 on the Capital City Bank represented part of the moneys that were then due from the clearing house to Reinhard & Company, and that his reason for giving the check to the defendant in error for $1161.74, and applying that much of what was due to Reinhard & Company to the payment of an equal amount of the indebtedness of the clearing house to the defendant in error, was that the check on Reinhard & Company, given the day before, had been returned to him (page 16 of the Record); that, when he delivered the check for $1161.74 to the cashier of the defendant in error, substituting it, in part, for the check previously given on the Deshler National Bank, the cashier asked him what reason there was for making the substitution, and that he told him not to ask any questions; and that he was not sure whether he said anything to the cashier about the failure of Reinhard & Company, althought he thought, before dinner, that he knew (pages 16 and 17 of the Record).

On cross-examination this witness testified that on the ninth of April, 1900, there was a balance due to the defendant in error in the amount of $10,245.63, and that for that balance he issued a check on Reinhard & Company for $1161.74, and on the Capital City Bank for $9083.89 (page 19 of the Record); that by a rule of the clearing house, which was quoted, checks on banks that were members of the clearing house association, were required to be presented on the next succeeding business day after the receipt of the same (page 19 of the Record); that the check given by the manager of the clearing house, on April 9, 1900, for $1161.74, to the defendant in error, was presented to the clearing house on the tenth day of April, 1900, and by its messenger taken down to Reinhard & Company's bank, with their other checks (page 20 of the Record); that he made out the balance, and gave a check to the defendant in error for this balance of $4875.98 on the Deshler National Bank, which the clearing house at that time owed the defendant in error (page 20 of the Record); that the Capital City Bank owed the clearing house, at that time, $7184.05, and that the Deshler National Bank owed the clearing house $14,507.26, and in the exercise of the discretion that was conferred upon him, he gave the defendant in error the check on the Deshler National Bank (page 20 of the Record); that the clearing house did not pay its debts, except running expenses, in money, and that the practice of taking up checks, as checks brought to the clearing house by the defendant in error, and of giving it a check on some other bank for the amount found due it, as was done by giving a check on the Deshler National Bank, was called clearing the checks (page 21 of the Record); that he did

not learn of the financial condition of Reinhard & Company until about a half an hour after the checks brought by the defendant in error had been cleared and its representative had departed with the clearing house check on the Deshler National Bank (page 21 of the Record); that the messenger brought back the dishonored checks from Reinhard & Company about one o'clock on the tenth day of April, 1900, (page 21 of the Record); that the checks so brought back were returned to the different banks that had cleared them, and that the check for $1161.74, given to the defendant in error on Reinhard & Company the day before, was properly returnable to the defendant in error, and thence to the clearing house, (page 22 of the Record); that at the time he gave the messenger of the defendant in error the check on the Deshler National Bank, he did not know of the assignment of Reinhard & Company; and that the Deshler National Bank and Capital City Bank were then solvent (page 22 of the Record); that the two checks which he gave in the afternoon to the defendant in error, or its cashier, one on the Capital City Bank for $1161.74, and the other on the Deshler National Bank, aggregated the amount of the check which he had previously sent to the defendant in error, by its messenger, on the Deshler National Bank; and that he was not sure that he told the cashier of the defendant in error that either of these checks were drawn on any balance due to Reinhard & Company.

On redirect examination this witness testified that he did not claim to have in his hands, or in the hands of the clearing house the $2132.19 (inadvertently designated as $2100.00) subject to the order of the trustee of Rein-

hard & Company, and he admitted that the balance due to said company had been disposed of, in the way he had described (page 23 of the Record); that the first check which he had drawn on the tenth day of April, 1900, upon the Deshler National Bank in favor of the defendant in error, included in it the amount of the check which had been drawn on Reinhard & Company the day before, counting the latter check, given the day before, as worthless (page 24 of the Record); and, immediately, in the next breath, he denied that he included in the amount of the first check on the Deshler National Bank the amount of the check given to the defendant in error, on Reinhard & Company, the day previous (pages 24 and 25 of the Record); that the clearing house was entitled to have the defendant in error surrender the check on the Deshler National Bank for $4875.98, and the clearing house was entitled to substitute for it the check for $3714.24, and the check for $1161.74, because the check given to the defendant in error on Reinhard & Company for $1161.74 April 9, 1900, had been returned unpaid (page 26 of the Record); that the clearing house was not a corporation, but was an association of banks, by which he was employed as manager (page 26 of the Record); that the clearing house has no money in its possession (page 26 of the Record); that as manager, he had authority to draw a check upon any member that was short to make its balance good, and all checks were required to be signed by him as manager (pages 26 of the Record); that part of the assets or checks brought to the clearing house by the defendant in error, on the tenth day of April, 1900, which caused it to have a balance against the clearing house of

$4800.00 (the correct amount was $4875.98), consisted of a clearing house check on Reinhard & Company for $1100.00 (the correct amount should be $1161.74), which "turned out to be no good, dishonored," and that that left Reinhard's bank, or the clearing house, owing the defendant in error, $3714.24 (page 27 of the Record); that all the other checks cleared that day on Reinhard & Company, and returned unpaid, were returned to the banks that sent them in, after deducting the amounts of the checks turned in by each bank from the clearings for the different banks which had sent them in, which reduced the credit of each bank in that amount (page 27 of the Record); that a rule of the clearing house association, which the witness quoted, provided that in case there was a failure to respond promptly to the checks of the manager on the part of any member of the association, the checks should be immediately returned to the manager, who should call upon the other banks or bankers to make up the sum for which payment had been refused, in proportion to the amount of checks upon the defaulting member sent into the clearing house at the preceding settlement, and that the sums so furnished or contributed should constitute claims in the hands of the responding members respectively against the defaulting members, that the checks received by the clearing house from the defaulting members should be delivered, if required, to the member owning the same without mutilation, and "that the agency of the clearing house was only that of a trustee, and in no case should the association be held responsible for any loss" that might occur, (page 28 of the Record;) that he was not sure that he communicated to Mr. Jennings, the cashier of the defendant in error, the fact that

Reinhard & Company had made an assignment. (Page 29 of the Record).

On the trial of the case, in the Common Pleas Court, the plaintiff also introduced himself as a witness, and he testified that he was familiar with the assets and liabilities of Reinhard & Company; that fifteen per cent. dividend had been declared and paid to the creditors of the company; that not more than ten per cent. more would be paid to the creditors; that the creditors numbered about 500.

There were no other witnesses examined by the plaintiff, and no other testimony offered except the testimony of the two witnesses, John Field, and the plaintiff, Fred C. Rector, trustee, and the facts agreed upon, as before stated.

We have stated fully and fairly the testimony of these two witnesses.

III.

Upon the conclusion of the plaintiff's testimony the defendant moved to arrest the testimony from the jury and for a judgment for the defendant dismissing the action of the plaintiff, which motion the Common Pleas Court sustained.

The plaintiff in error had the case taken to the Circuit Court upon petition in error, which court affirmed the judgment of the Common Pleas Court.

But the Circuit Court handed down an opinion affirming the judgment of the lower court; and in order that the court may know what the reason was, we quote that opinion in full, as follows:

"The facts in these cases are not the same, but in the opinion of the court each must be; in these proceedings in error, disposed of on the same ground, and for that reason one opinion will answer for both.

The cause of action in each case is that a voidable preference had been given by Reinhard & Company, insolvent debtor, to each of the defendant banks on which the trustee seeks to recover.

In our opinion no preference was shown. Reinhard & Company gave nothing to within banks. The proof does not show that the manager of the clearing house has any authority to do what he did. The business of the ninth of April was closed, and the rule offered in evidence prescribes what was to be done when a clearing house check was not paid. That check was not to be carried into the next day's business, but the amount of that check was to be pro-rated by the banks that had on the ninth cleared checks on Reinhard & Co., and each of these banks was to have a claim, not against the clearing house, but against Reinhard & Co., for its pro rata part of the amount of that check.

Under the proof, the manager of the clearing house, as agent of Reinhard & Company, was not clothed with power to apply their credit or funds of the tenth to the payment of the check of the ninth, and if he had been, he had notice of the assignment before he attempted to exercise the power and his agency was thus terminated.

It may be that the contention of counsel for the trustee is sound, and as to that we express no opinion, but if it is, we are inclined to the opinion that they may recover as for a conversion; and being of the opinion that the cause of action stated in the petition is not made out by the proof, it follows that the judgments are affirmed.

SUMMERS, J."

There was submitted to the Circuit Court with this case, the case of Fred C. Rector, Trustee, vs. The Commercial Bank, now in this court, as cause No. 8161, and this explains why the court speaks of cases in the plural. The defendant in error (defendant below) offered no evidence to controvert the evidence offered by the plaintiff in error. If there was evidence offered by the plaintiff in error to sustain the allegations of his petition, the Common Pleas Court had no power to withdraw the case from the jury and enter up a judgment in favor of the defendant in error.

Dick vs. R. R. Co., 38 O. S., 389.

And the Circuit Court erred in affirming the erroneous judgment of the Common Pleas Court.

The plaintiff in error was entitled to have the issues made by the pleadings submitted to the jury, upon the evidence, which the plaintiff in error introduced. The evidence not being contradicted, every fact which it tended to prove was admitted. Neither of the other courts had any right or power to weigh or sift the evidence. They were obliged to assume that the facts which the evidence was offered to prove were proved, if there was any evidence to sustain the allegations of the petition of the plaintiff in error.

And neither of the other courts reached the conclusion which resulted in their judgments, by any process of reasoning in regard to the weight or truth of the evidence.

The Supreme Court of Ohio affirmed the judgment of the Circuit Court without opinion or report.

IV.

JURISDICTION.

Opposite counsel have warned us that they will challenge the jurisdiction of this court.

(a) The controversy here is about moneys or a credit which belonged to Reinhard & Company, the bankrupts, on the day they made their assignment, and on the day the petition in bankruptcy was filed against them. That money, or credit, was in the hands of the Clearing House on both of these dates. The defendant in error never contended or claimed that the bankrupts did not have title then to this money. The assertion of the right to receive it in payment of its debt was an admission that the money or credit belonged to the bankrupts. The defendant in error's defense is that the money never passed to the trustee of the bankrupt; that the Clearing House had the right to pay it to the defendant in error as a creditor of the bankrupts. The plaintiff in error maintained that the transfer and payment of the money to the defendant in error by the Clearing House amounted to a voidable preference under the United States bankrupt law, and that he as a trustee was entitled to have the moneys or the credit paid to him by the Clearing House. The state courts, by their decisions, denied to the plaintiff in error as trustee his right to the moneys or credits which he derived from the bankrupt law.

(b) If we have stated the question correctly, there can be no doubt about the jurisdiction of this court.

In Scott, Assignee, v. Kelley, 22 Wall., 57, this court decided this: "When the question in a state court is not whether if the bankrupt had title, it would pass to his assignee under the Bankrupt Act, but whether he had title at all, and the state court decides that he had not, no question of which this court can take jurisdiction under Section 709 of the Revised Statutes is presented."

The converse of this case is that, if the title of the bankrupt is not questioned, and if the question is whether the property passed to his trustee under the bankrupt act, then this court has jurisdiction. This decision was reaffirmed in McKenna v. Simpson, 129 U. S., 506, and in Cramer v. Wilson, 195 U. S., 408.

(c) Opposite counsel appeal for support of their challenge to the case of Thompson v. Fairbanks, 196 U. S., 516. They evidently rely upon this statement in the opinion: "The question whether any conveyance, etc., was in fact made with the intent to defraud creditors, when passed upon in the state court, is not one of a federal nature." Thompson, Trustee, brought his suit in the state court in which he claimed the property in controversy, and in which he also alleged that it had been transferred to Fairbanks with a view to give preference to him, and that at the time it was transferred, Fairbanks had reasonable cause to believe that the transfer was intended to give a preference. This court proceeded to discuss and determine the case, notwithstanding the statement which we have quoted. That is to say, the question whether the transfer was a voidable preference was discussed and determined.

There are only two differences between the declaration of the assignee in that case and the petition of the trus-

tee, in the case at bar. In the former, there was no allegation that the transfer was made with the intent to defraud creditors; in the latter, there is such an allegation, but it has never been relied upon in any stage of the case. In both the declaration there, and the petition here, it is alleged that the transfer was a voidable preference. In the former case it is alleged that the transfer and delivery "were in fraud of the laws relating to bankruptcy;" in the petition of the trustee here, there is no specific reference to the bankrupt law.

If the trustee had incorporated in his petition an averment that the transfer and payment of the moneys or credit were in violation or in fraud of the bankrupt law, it would have been bad pleading under the code system that prevails in Ohio, and might have been struck out on motion. The petition here recites the assignment for the benefit of creditors under the state law, the insolvency of the assignors, the filing of the petition in bankruptcy, the adjudication in bankruptcy, the appointment of the trustee—all of which, together with the allegations about the transfer and payment of the money, show a voidable preference, and that the petitioner intended to assert a right under the bankrupt law. All of this appears on the face of the record, and is in strict conformity with the rule as laid down in Hoyt v. Sheldon, 1 Black, 518, Maxwell v. Newbold, 18 How., 515, and in other subsequent cases.

The averments of the petition are not so general that it can only be inferred or argued therefrom that a right under the bankrupt law was claimed.

If the petition should be deemed too general and indefinite, the certificate of the Chief Justice of the Supreme Court of Ohio makes it more specific and certain, which

is the function of a certificate. Brown v. Atwell, 92 U. S., 327.

It was not necessary that the petition should aver, in so many words, or positively, that the right which the petitioner claimed was derived from or under the bankrupt law. In Crowell v. Randall, 10 Pet., 368, 12 Curtiss's Dec., 164, it was said "that it is not indispensable that it should appear on the record in *tolidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question, as indspensable to that judgment.

In Miller v. Nichols, 4 Wheat., 311, Chief Justice Marshall said: "It would not be required that the record should, in terms, state a misconstruction of the act of Congress, or that an act of Congress was drawn in question. It would have been sufficient to give this court jurisdiction in the cause, if the record was applicable to the case." If this is the rule, the petition of the trustee here was sufficient.

In Wilson v. The Blackbird Creek Marsh Co., 2 Pet., 245, 8 Curtiss's Dec., 105, Chief Justice Marshall reiterated what he said in the other case. There was no express averment in the pleading there that the United States Constitution or law was questioned, etc.

One of the cases which was cited in support of the statement quoted from the opinion in Thompson v. Fairbanks,

supra, is Cramer v. Wilson, supra. But it expressly appears that the deed which was assailed as fraudulent and void, in that case, was made a year before the commencement of the suit, and "was not attacked as invalid under the bankrupt law of 1867 * * * then in force, but as a fraudulent conveyance under the state law." It is, then, differentiated from this case in two particulars: First, the deed was made with the intent to defraud creditors, making the question one purely of fraud; and, second, it was challenged as a violation of the state law, and not of the bankrupt law.

We insist that the state courts, in the case at bar, did not decide that the bankrupts did not have title to the moneys or credits about which the controversy centers; but, conceding that they had such title, they decided that it did not pass to the trustee, the plaintiff in error.

In Williams v. Heard, 140 U. S., 529, this court decided that, where an assignee in bankruptcy claimed certain property as belonging to him under the bankrupt act, and the state court decided against his title, this court has jurisdiction to review the decision of the state court. This was reaffirmed in Dushane v. Beall, 161 U. S., 513, Chief Justice Fuller saying: "The question whether the assignee in bankruptcy was entitled to this claim was clearly a federal question."

V.

THERE IS NO QUESTION OF FACT.

(a) The plaintiff in error does not ask this court to review the decision of a question of fact, to sift and weigh evidence. There is no question of conflict of testimony; the defendant in error did not offer any testimony; it is only the evidence of the plaintiff in error that is in the record. That evidence was arrested from the jury by the trial court and a verdict was ordered. It is entirely a question of law whether the trial court erred and whether the other courts erred in affirming that judgment. If there is any evidence in the record, offered by the plaintiff in error, which sustains his claim, it should have been submitted to the jury. The motion of the defendant in error to withdraw the case from the jury was an admission of all the facts which the evidence tended to prove, and there was presented only a question of law to the court.

"A motion to arrest the testimony from the jury, and render a judgment against the party on whom the burden of proof rests, involves an admission of all the facts which the evidence tends to prove, and presents only a question of law to the court; but if there is evidence tending to prove each material fact put in issue, and indispensable to recovery, it should be submitted to the jury under particular instructions." Dick v. Railway Co., 38 O. St., 389.

So that, this court is called upon merely to determine whether there is evidence which sustained the claim of the plaintiff in error.

(b) The evidence bore upon a federal question. The trial court, as well as the appellate state courts, did not decide the question on the weight or sufficiency of the evidence to prove a fact, but they made a decision as to the "competency and legal effect of the evidence bearing upon a question of federal law." That makes the decision of the Supreme Court of the state reviewable here.

In Dower v. Richards, 151 U. S., 658, Justice Gray said: "When, indeed, a question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron: "The powers of the Supreme Court are limited, in cases coming up from the state courts, under the twenty-fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity or treaty of the statutes of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant, cannot raise a question involving either the validity or construction of an act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be, in admitting the evidence to establish the fact; but when evidence is admitted as competent for this purpose, and it

is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts, on the effect of such evidence, may be fully considered here and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a Supreme Court of error of a state, in reversing the proceedings of inferior courts of original jurisdiction." Mackay v. Dillon, 4 Howard, 421.

VI.

WAS THERE A VOIDABLE PREFERENCE?

The theory of the plaintiff in error was, and is, that there was an unlawful preference given to the defendant in error, as a creditor of Reinhard & Company, bankrupts, by the bankrupt, in violation of the United States Bankrupt Law. In effect, the Circuit Court, in its opinion, admitted that every fact which the plaintiff in error had to prove, to make out a case of preference, was proved except one. That single fact, which was not proved, was, in the opinion of the Circuit Court, that the preference was given by Reinhard & Company. The court said:

"In our opinion no preference is shown. Reinhard & Company gave nothing to within banks."

(The City Deposit Bank and Commercial National Bank are the banks meant by the term "banks.")

"The proof does not show that the manager of the clearing house had any authority to do what he did."

In these three sentences, is the essence of the opinion and conclusion of the Circuit Court.

Section 60*a* of the Bankrupt Law reads:

"A person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60*b* of the same law reads:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

These are the sections and provisions of the bankrupt law which we assert, were violated, when $1161.74 of property belonging to Reinhard & Company was transferred to the defendant in error by the manager of the clearing house.

As Section 57*g* may have some bearing upon the question, we quote it:

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

We quote this because there is a larger number of adjudicated cases, in the Federal Courts, in regard to this provision than in regard to the other section.

The term "transfer," used in Section 60*a*, is defined by Section 1, of the bankrupt statute to "include the sale

and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

To make out a case of preference, the plaintiff in error was required to prove the following facts:

(1) That a petition, praying that Reinhard & Company should be adjudged bankrupts, was filed in the United States District Court, in bankruptcy.

(2) That Reinhard & Company were by said court adjudged bankrupts.

(3) That some of the property of Reinhard & Company was transferred to the defendant in error.

(4) That Reinhard & Company was, at that time, insolvent.

(5) That the said transfer was made within four months before the filing of the petition, or after the filing of the petition, and before the adjudication.

(6) That the effect of the transfer was that the defendant in error obtained a greater percentage of its claim against Reinhard & Company than any of the other creditors of the same class.

(7) That the transfer of the property was made by Reinhard & Company, or its agent.

(8) That the defendant in error, or its agent, "acting therein," had reasonable cause to believe that a preference was intended to be given by the transfer.

Were these facts proved by the plaintiff in error?

(a) It was alleged in the petition of the plaintiff in error that the petition in bankruptcy, praying for the adjudication, was "duly filed in said court on April 11,

A. D. 1900." This allegation was denied by the answer; but the defendant in error, for the purposes of the trial, and on the trial, admitted "that the petition in bankruptcy was filed on the eleventh day of April, 1900." (Page 30 of the Record).

(b) It was also admitted on the trial, by the defendant in error, that Reinhard & Company, and also John G. Reinhard and Henry A. Reinhard, the only partners of said company, "were adjudged by the United States Court bankrupts," on the tenth day of August, 1900. (Page 30 of the Record.)

(c) The undisputed testimony of John Field, the manager of the clearing house, was that $1161.74, property of Reinhard & Company, was transferred, on the tenth day of April, 1900, by him to the defendant in error. (Pages 9 and 10 of Record, and other pages too numerous to mention..)

(d) It was admitted by the defendant in error, for the purposes of the trial, that Reinhard & Company, and as well also John G. Reinhard and Henry A. Reinhard, were on the tenth day of April, 1900, insolvent. (Page 30 of the Record.)

(e) It having been admitted that the petition in bankruptcy was filed on April 11, 1900, and that the transfer was made on the same day, it requires no further statement to show that the transfer was made within four months before the filing of the petition.

(f) That the undisputed testimony of the trustee, Fred C. Rector, was that the assets of Reinhard & Company were only sufficient to pay 25% of their indebtedness. But, the whole claim of the defendant in error was paid

by the payment or transfer of $1161.74. It received 100% of its claim, while all the creditors will receive only 25% of their claims. (Page 31 of the Record.)

(g) Was the transfer or payment of $1161.74, made by Reinhard & Company?

On this question the Circuit Court ruled against us, and for the reason already stated.

The fact—undisputed fact—is, that the defendant in error was paid $1161.74, which belonged to Reinhard & Company. The effect of this was to reduce the assets of Reinhard & Company, *when insolvent*, to the harm of their other creditors. The fact that it was paid *indirectly, circuitously*, to the defendant in error, was, as the authorities show, immaterial. Assume, for the purpose of the argument, that it was not made by Reinhard & Company, or their agent. Still, the fact is that a preference was given and received. The case of In re Lyon illustrates and enforces this point. (114 Fed. Rep., 327).

On January 2, 1900, a bankrupt delivered a check for $215.00 on the Astor Place Bank to one of its creditors, George Batton & Company, the check being dated January 20, 1900. On January 20, 1900, Batton & Company deposited this check with the National Shoe & Leather Bank; on the next day that bank received the money on the check, through the clearing house, and the amount of it was charged by the Astor Place Bank against the account of the bankrupt. On this posture of facts, the court declared and decided "that the creditor had received a preference. though the payment was made to him through the medium of the N. Bank, and not directly, * * *."

It was also, by the court, declared:

"The effect of the delivery of the check to the petitioner" (Batton & Company) "was to diminish the assets of the bankrupt when insolvent, to the detriment of its other creditors * * *. *There was, therefore, a payment*, when insolvent, and it was a payment directly for the benefit of the petitioner, through the medium of its bank."

Thereupon the court affirmed the order of the referee, who, in his opinion had, among other things, said:

"A creditor receives a preference when there is actually transferred to him, either in money or in other value, part of the debtors property."

The point we make is that, in that case, as in the case at bar, the payment was not made directly by the bankrupt. Notwithstanding the payment of the $1161.74 was not made, directly, by Reinhard & Company, and notwithstanding it was made through the medium of the manager of the clearing house, it was a voidable preference; because the assets of Reinhard & Company were, to that extent, diminished, "to the detriment of their other creditors."

We concede that the payment was not made *directly* by Reinhard & Company, that is by one of the firm. But it was not necessary to prove that it was so done.

"Mode of Transfer Immaterial.—If the transfer does diminish the assets of the bankrupt's estate, and it is done to give one creditor an advantage over another, then whatever may be the mode of transfer, or however intricate or circuitous the means by which it was carried into execution, it will constitute a preference; * * *."

Collier on Bankruptcy, page 356.

The author illustrates the proposition by citing two cases, in one of which the debtor conveyed property to

his wife without any consideration, and then, she mortgaged it in favor of his creditors. (Gibson vs. Dobie, 5 Biss., 198; Fed. Cas., 5394.)

*And in the other a transfer of the assets of a partner*ship held in the name of a silent partner was made to the active partner, who, on the same day mortgaged them to secure the claim of a separate creditor, thereby securing an advantage over firm creditors.

In re Waite, 1 Low., 207; Fed. Cas., 17044.

But the payment of the $1161.74 was made by the agent of Reinhard & Compay to the defendant in error. Whatever Reinhard & Company could do themselves, they could do by an agent.

The clearing house and its manager were agents of all the banks which belonged to the clearing house. The clearing house association was created by a voluntary contract entered into between the banks that formed the same. As was said by one court, it was a common banker of the members of the association.

> Merchants' National Bank vs. National Bank of the Commonwealth, 139 Mass., 513.
> See also, Yardley vs. Philler, 167 U. S., 344, 359.

In the opinion delivered in the latter case, it is said:

"It is obvious that the clearing house association was an agent and fiduciary representative of all the banks forming the association." (Page 359 of the report).

Under the rule of the clearing house, which was put in evidence, and which was made by all the members of the clearing house, each bank being a party to the contract, the clearing house was made the agent of each and all of the members of the clearing house association. (Page 28 of the Record).

It is true the rule also qualified the agency of the clearing house by providing that its responsibility should be that of a trustee.

The law, even in the absence of a rule adopted by the members of the clearing house association, constituted the clearing house the agent of each and every one of the members thereof, and by the rule the law was expressly made part of the contract entered into by the banks when they formed the clearing house association.

The payment of $1161.74, property belonging to Reinhard & Company, having been made by the agent of Reinhard & Company to the defendant in error, it stands, in the judgment of the law, just as if the payment had been made by Reinhard & Company.

It is obvious that the relation of creditor and debtor existed on the tenth day of April, 1900, between the defendant in error and Reinhard & Company.

On the ninth day of April, 1900, the day previous, the clearing house manager delivered to the defendant in error a clearing house check on Reinhard & Company for $1161.74, Reinhard & Company then being in debt to the clearing house in an equal or larger amount.

Ordinarily, it is true, a check upon a bank is a mere order on the bank, and the holder thereof acquires no right against the bank until the check has either been accepted or certified by the bank.

But it is equally sound law that a promise made by a bank, to accept a check, before it is drawn, is binding upon the bank to any person who took the check upon the strength of the promise, and it makes the bank liable to the holder who so took it, whether it has funds or not.

The bank in such an instance becomes the debtor of the holder of the check, and the holder of the check is the bank's creditor. The holder can maintain a suit against the bank, upon the ground that the bank had accepted the check. The case of Hall, et al., vs. Cordell, et al., 142 U. S., 116, illustrates this proposition. It was a bill of exchange which was accepted in that case, but the rule, which applies to a bill of exchange, also applies to a check or order.

Zane on Banks and Banking, Secs. 146 and 215, and authorities cited.

In the case at bar one of the powers vested in the manager of the clearing house was to issue checks each day, on the debtor banks, in favor of the creditor banks. That is to say, if, upon a given day a balance was found in favor of Bank A, and a balance was found against Bank B, the manager of the clearing house was authorized to draw a check in favor of A against B. The undisputed testimony of the manager of the clearing house shows that was the rule. (Pages 20, 21, 24, 25, 26 and 27 of the Record).

In conformity to the authority thus vested in the manager of the clearing house, on the ninth of April, 1900, he delivered a check to the defendant in error, a clearing house check, for $1161.74 on Reinhard & Company, bankers—a check with the words "Clearing House" at the head. On that day the manager ascertained that the defendant in error was a creditor bank, and that Reinhard & Company were a debtor bank. Just as soon as that check was delivered to and accepted by the defendant in error, as it was, the relation of creditor and debtor was

created between it and Reinhard & Company. This relationship existed, in virtue of the contract which was entered into by all the banks, when they formed and established the clearing house association, and when they made the rules to govern the association and invested the manager thereof with his powers.

Upon the failure of Reinhard & Company to pay this check, the defendant in error did not have any right of recourse back upon the clearing house. This fact was established by the undisputed evidence. We appeal to the last question and answer upon pages 26 and 27 of the Record.

The rule, which was put in evidence, also, expressly provided that "the agency of the clearing house in the matter, * * * is only as a trustee, and in no case is the association to be held responsible for any loss that may occur." (This provision in the rule will have great significance, if it should be contended, in this case, that the trustee, the plaintiff in error, should have sued the clearing house association, instead of the defendant in error for the recovery of the money, the property, belonging to Reinhard & Company, which was misappropriated).

On the next day, the tenth day of April, 1900, the clearing house check for $1161.74, payable to the defendant in error, against, and upon Reinhard & Company, came back dishonored. That did not extinguish the relation of creditor and debtor between the defendant in error and Reinhard & Company; Reinhard & Company still owed the defendant in error that sum of money. The check was returned to the clearing house and its amount was added to the balance, which was struck in favor of

the defendant in error, as owing to it from the clearing house.

If the defendant in error had the right, as a member of the clearing house association, to return the check to the clearing house, and if the manager cleared it, as he would any other check upon any of the members of the association, then the manager of the clearing house had a right to consider the amount of the check as part of the balance in favor of the defendant in error. For the present we pass the question, whether the defendant in error had such a right, and the manager had such power; it is immaterial.

The manager, according to his undisputed testimony, which the other courts were obliged to assume was true, considered the amount of the check, $1161.74, as part of the balance ascertained in favor of the defendant in error. He delivered to the defendant in error a check upon the Deshler National Bank, in favor of the defendant in error for the whole balance. It is probably not certain, from a consideration of his testimony, whether he struck the balance in favor of the defendant in error, before or after he ascertained that the check drawn the day previously, on Reinhard & Company, was dishonored. The fair and reasonable inference is that it must have been done after that was ascertained. He may have, first, struck a balance in favor of the defendant in error for a given amount, and then afterwards, upon learning that Reinhard & Company had failed to pay the check of the previous day, have changed the balance in favor of the defendant in error. It is immaterial which way it was done, because it was not until after the manager had ascertained that the check had been dishonored by Rein-

hard & Company, and after he had learned that Reinhard & Company had made an assignment, that he drew the check in favor of the defendant in error for $1161.74 against the balance in favor of Reinhard & Company.

The undisputed testimony of the manager is that he first drew a check in favor of the defendant in error, upon the Deshler National Bank for $4875.98, the Deshler National Bank then owing the clearing house $13,407.26. (Pages 20 and 21 of the Record.)

He admitted that he had first testified that that check was $3174.24, but that that statement was not correct. (Page 16 of the Record).

He took up from the defendant in error the check on the Deshler National Bank for $4875.98, and substituted for it two checks, one on the Deshler National Bank for $3714.24, and one on the Capital City Bank for $1161.74, the Capital City Bank then being a debtor bank in the amount of $7184.05.

His undisputed testimony was that the check for $1161.74 on the Capital City Bank, delivered to the defendant in error, represented an equal amount of the money which was at that time due from the clearing house to Reinhard & Company, and that he applied that much of the Reinhard & Company money to the payment of an equal amount of the indebtedness due to the defendant in error. (Pages 16 and 17 of the Record).

In the exercise of the authority and power which was vested in him to draw checks, signed by him as manager of the clearing house, against debtor banks in favor of creditor banks, he says he drew and delivered the check to the defendant in error for $1161.74 on the Capital

City Bank. He was then acting as the agent of each and every one of the banks which belonged to the clearing house association. The testimony of the manager that he had such authority, as manager of the clearing house association, was just as competent evidence, as was the testimony in regard to the rule, upon which the Circuit Court seemed to rely. He gave the substance of a rule or rules when he so testified. Neither party objected to this mode of proving the rule or rules, or demanded the production of the rules. It may be that there is a conflict between the provisions of the rule in regard to how checks of the manager, which were not promptly paid by the debtor banks, should be paid, and the rule giving him the authority, which the undisputed testimony of the manager shows he possessed, to draw checks in favor of the creditor banks against the debtor banks, on each day after the balances had been ascertained. But neither of the other courts had a right to weigh the testimony and reconcile contradictions in the testimony of the manager. The facts stand out prominently in the record; they are established by the undisputed testimony of the manager, that there was a balance found due in favor of Reinhard & Company for $2132.19 on the tenth of April, 1900; that as the manager of the clearing house association, and as the agent of each and every one of the banks, and as the agent of Reinhard & Company, he drew and delivered a check for part of that balance to the defendant in error, namely, $1161.74, against a debtor bank, the Capital City Bank. It was a transfer of that much property belonging to Reinhard & Company, it was a payment of that much money belonging to Reinhard & Company, made

by an agent of Reinhard & Company; and it stands in the contemplation of law, just as if it had been made by Reinhard & Company themselves.

But even if the manager of the clearing house had no authority to make the payment for Reinhard & Company, as the Circuit Court assumed, who had the right to object? Nobody but Reinhard & Company, or their representative. The record does not disclose that any objection was ever made by Reinhard & Company to the act of the manager in making the payment of $1161.74 to the defendant in error. And the other courts had no power to make this objection for Reinhard & Company.

(h) Did the defendant in error, at the time the payment of $1161.74 was made to it, out of the monies belonging to Reinhard & Company, have reasonable cause to believe that a preference was intended? This payment was made, according to the undisputed testimony, about two o'clock, on the afternoon of April 10, 1900. (Page 14 of the Record). The payment was made to Mr. Jennings, the cashier of the defendant in error. The manager, at that time, was the agent of the defendant in error, because it was a member of the clearing house association. One hour before he made the payment, he knew that Reinhard & Company's bank had made an assignment. (Page 9 of the Record).

This is not all the evidence pertinent to the question, whether the defendant in error had reasonable cause to believe that a preference was intended. Whatever knowledge Mr. Jennings, the cashier, had, the defendant in error had. In the first instance, the manager testified that he informed Mr. Jennings, when he made the pay-

ment when he delivered the check for $1161.74 to him, that Reinhard & Company "*had failed.*" (Bottom of page 14 of the Record).

It is true the manager said, afterwards, after he had been refreshed by a dinner, that he was not positive whether he said anything to Jennings or not. He did admit, however, that Jennings asked him why he was making the substitution of two checks for one check, and that he told him not to ask any questions. But the plaintiff in error was entitled to have the evidence, though self-contradictory, submitted to the jury. Neither of the other courts had a right to assume that one of these statements made by the manager was true, and the other was false.

But we are content to take either statement as the truth. If the manager informed Jennings, the cashier, that Reinhard & Company "had failed," the defendant in error had reasonable cause to believe that a preference was intended by the payment; and so, if the manager merely informed Mr. Jennings that he must not ask any questions as to why he was making the payment of the balance due to it by substituting two checks for one check, the defendant in error had reasonable cause to believe that a preference was intended.

Here is a case in which one of the agents of the defendant in error, as well as the agent of Reinhard & Company, knew at one o'clock in the afternoon that Reinhard & Company had made an assignment for the benefit of their creditors, and in which one hour later, another agent of the defendant in error, its own cashier, Mr. Jennings, knew that Reinhard & Company had failed; and after

such information was possessed by such agents, the payment of the $1161.74 was made. Could there be conceived stronger evidence of a reasonable cause to believe that a preference was intended?

The plaintiff in error was not obliged to prove that the defendant in error knew, or had reasonable cause to believe that Reinhard & Company was then insolvent; and yet the evidence conclusively shows that it had such reasonable cause. Knowledge that a bank had made an assignment, or that it "had failed," is certainly sufficient to constitute reasonable cause for believing that the bank was insolvent. Any man of ordinary caution and prudence, having such information, would infer that such a bank was insolvent. The defendant in error would not infer that the creditors of the bank of Reinhard & Company would be paid in full. On the contrary, it should have assumed, or inferred, that a bank which had made an assignment, or which had failed, would not pay its creditors in full. It is common experience that persons or corporations who, or which, have made assignments, or have failed in business, do not pay their creditors in full.

Moreover, that is precisely what the insolvency of Reinhard & Company then meant in law; the bankrupt statute declares that if they were then insolvent, they could not pay their creditors in full. We quote the definition of insolvency contained in the statute. "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, canceled or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation, be sufficient in

amount to pay his debts." (Section I, Clause 15 of the Bankrupt Act).

The bankrupt statute required the plaintiff in error to prove that the defendant in error had reasonable cause to believe that a preference was intended. No more was required. (Section 60*b*, quoted on page 24 of this brief).

To satisfy the statute, the plaintiff in error was only obliged to prove that the defendant in error had reasonable cause to be put upon inquiry as to whether a preference was actually given or not. This is what the statute means.

The rule is correctly stated by Mr. Loveland, in his work entitled, "Law and Proceedings in Bankruptcy," section 194, page 468, thus:

"It is not necessary that a creditor knows, or even actually believes, that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice; where the means of knowledge are at hand, and if a party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, and he is chargeable with knowledge of all the facts, which, by a proper inquiry, he might have ascertained."

The rule in regard to the quantity of evidence, which is sufficient to establish that a creditor who received a payment, or transfer of property from a bankrupt, had reasonable cause to be put upon inquiry, is stated and il-

lustrated, in another paragraph, by the same author, in these words:

"It may be collated from the decisions that a person has reasonable cause for inquiry, where a banker allows his drafts to go to protest, suspends payment and closes his doors against depositors, and the creditor has knowledge of these facts, or where a merchant stops payment of his commercial paper, and the holder is compelled to bring a suit to which no defense is put in, or where a merchant fails to meet his debts as they mature in the ordinary course of business. The existence of a general financial crisis should put a prudent man upon inquiry with reference to doubtful debtors, or rumors which a creditor has heard about his debtor's embarrassment, or any transfer or payment made to a creditor out of the ordinary course of business." (Pages 470 and 471).

When the payment of $1161.74 was made to the defendant in error, at about 2 o'clock on April 10, 1900, the defendant in error knew that the check which it had received on the day before, on Reinhard & Company, for an equal amount, had not been paid; the messenger of the clearing house took the check down to the bank of Reinhard & Company, and brought it back to the clearing house, because it was not paid (page 13 of the Record); the manager of the bank, at the time the payment was made, told Jennings, the cashier, that the check had been returned. This information was sufficient and reasonable cause to put the defendant in error upon inquiry. The duty of diligence was stronger, if Mr. Jennings knew that Reinhard & Company had not only failed to pay its own check, but "had failed," which was the information that had been given to him by the manager, before the payment was made.

The evidence, in the record, which proves that the defendant in error had reasonable cause to be put upon

inquiry, or reasonable cause to believe that a preference was intended, is so conclusive, that it is unnecessary to indulge in any further discussion of the question. The defendant in error not only had such reasonable cause, but we are moreover justified in saying that it knew that it was getting a preference, and that a preference was intended. It knew it was getting one hundred per cent. of its claim against Reinhard & Company, and it was bound to know that a collapsed bank would not pay all of its creditors in full. It was obliged to know what common experience as well as the law taught it.

The plaintiff in error was not required to prove that there was a "conscious participation" of the defendant in error and Reinhard & Company "in the same intent, namely, the intent to give a preference."

Pirie vs. Chicago Title & Trust Co., 182 U. S., 438; 21 Sup. Ct., 906.

The test of a voidable preference is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend out of the estate of the bankrupt, than that estate will pay on other claims. It is the effect which it has upon the distribution of the estate of the bankrupt, and not its effect upon the creditor that gives character to the preference. This is the controlling thought and purpose of the statute.

In re Bashline, 109 Fed. Rep., 966, in discussing the meaning and purpose of the Bankrupt Statute as to preferences, Judge Buffington said:

"It will be noted that insolvency and the effect of the transfer are the sole tests prescribed by this subdivision. The question of the intent of either the debtors or the creditors are not made elements, but the fact of the

debtor's insolvency and the effect of the transfer determine the character as a preference of the payment."

The Federal Courts have repeatediy declared that the two controlling purposes of the bankrupt statute are: "(1) The protection and discharge of the bankrupt; and (2) the distribution of the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors."

The two objects of the statute, which are most prominently set forth, are the security and relief of the bankrupt, and the equal distribution of his property among his creditors. The purpose, to "level the creditors," as Lord Hardwicke put it, is as conspicuous as the other purpose. Section 60*a* defines the preference, not only for the purposes of that section, but for the purposes of Section 57*g*, and all parts of the Bankrupt Statute.

30 Stat. c., 541, pages 560, 562;
Kimball vs. E. A. Rosenham Co., 114 Fed., 85;
Pirie vs. Trust Co., supra.

What Justice Field, Toof vs. Martin, 13 Wall., 40, 51, said of another bankrupt statute is equally relevant to the present statute:

"The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act."

Let us suppose that we are wrong in our contentions, and that the Circuit Court's conclusion, that there was no preference given, because the manager of the clearing house had no authority to do what he did, was sound.

Still, the Circuit Court erred in affirming the judgment of the Common Pleas Court. In its opinion that court said:

"It may be that the contention of counsel for the trustee is sound, and as to that we express no opinion, but if it is, we are inclined to the opinion that they may recover as for a conversion, and being of the opinion that the cause of action stated in the petition is not made out by the proof, it follows that the judgments are affirmed."

In other words, the court said that the plaintiff in error should have sued for a *conversion* of the $1161.74, instead of suing for its recovery upon the ground that a preference had been given. The meaning of the conclusion of the court is that the form of the action was misconceived; and that, if the plaintiff in error had sued for the money, on the ground that it had been converted by the defendant in error, the judgment would not have been affirmed. But forms of action have been abolished in Ohio.

The petition of the plaintiff in error was abundantly sufficient to authorize a recovery, even if there had been no preference intended, and there had been simply a conversion of the $1161.74 by the defendant in error.

It alleges that Reinhard & Company assigned and transferred to the defendant in error, and that the defendant in error received, of the monies belonging to said Reinhard & Company, $1300. (The evidence showed that it was only $1161.74).

Conversion consists of any distinct act of dominion wrongfully exerted over another's personal property, thereby denying his right. It is any unauthorized act which deprives a person of his property, permanently, or for any indefinite time.

The import of the decision by the Circuit Court is, that there was a variance between the proof offered by the plaintiff in error and the allegations of his petition. If there was a mere variance, and not a failure of proof, the objection should have been made on the trial. It was too late to make the objection, for the first time, in the appellate court.

Spear vs. Bishop et al., 24 O. S., 598.
Hoffman vs. Gordon & Bro., 15 O. S., 211.

If there was merely a variance between the allegations of the petition and the proof, there should have been a showing, that the defendant in error was misled to its prejudice; and if the Common Pleas Court had concluded that there was such a variance, the plaintiff in error was entitled to amend his petition.

Section 5294 of the Revised Statutes.

It was not a case of a failure of proof, if the theory of the Circuit Court is sound. It is not a case of failure of proof when the allegations of the petition are only unproved in some part or parts.

It is only when the allegations of the petition, "in their general scope and meaning," are not proved, that a failure of proof can be said to exist. It is where, as one court has expressed it, no cause of action has been proved.

To make out a case of preference, in the case at bar, eight propositons had to be established by the evidence, as we have endeavored to show. Each of those propositions was essential, under the provisions of the Bankrupt Act. According to the Circuit Court, the plaintiff in error only failed to prove one of those propositions. The record demonstrates that the plaintiff in error proved that

one. There was not, therefore, a case of failure of proof, before the Circuit Court, upon its hypothesis of the case. It was merely a case where there was a variance of proof, and, since the objection was not made upon that ground, in the lower court, and no opportunity was given to the plaintiff in error to amend his petition, the Circuit Court erred in affirming the judgment of the Common Pleas Court, and the Supreme Court also erred in affirming the Circuit Court.

The evidence introduced by the plaintiff in error was sufficient to prove a conversion. The money was illegally applied to the payment of the claim of the defendant in error. It was illegally converted by the defendant in error to its own use. The property did not belong to the defendant in error; it belonged to Reinhard & Company.

The evidence in the record shows all this to be true.

Reply to Assumed Arguments by Opposite Counsel.

(1) Opposite counsel may deny that the $1161.74 which was paid to the defendant in error was part of the property of Reinhard & Company, the bankrupt.

If there is any evidence at all in the record tending to prove that the $1161.74 was the property of Reinhard & Company, opposite counsel are effectually answered. On page 20 of the record, the following questions were propounded to the manager of the clearing house, and he made the answers that immediately follow the questions:

"Q. Had you any moneys in your hands, or subject to your orders, as manager of the clearing house *at that time*," (April 10, 1900) "belonging to Reinhard & Company? A. I had a balance that stood on my books as due

Reinhard & Company's Bank something like a couple of thousand dollars; I do not know the exact amount.

Q. What was done with that balance?. A. Well, I gave a check to the City Deposit Bank for twelve or thirteen hundred dollars. I could tell you the exact amount if you wanted me to get the book.

Q. You better get the exact amount, I guess, Mr. Field. (Here witness refers to book.) A. Gave a check to the City Deposit Bank for $1161.74."

On page 21 of the record, the same witness stated that the balance which stood on the books as due Reinhard & Company was the precise sum of $2132.19.

Opposite counsel may attempt to show, by quotations from the testimony of this same witness, that the balance of $2132.19 did not belong to Reinhard & Company because the same witness' testimony showed that Reinhard & Company was a debtor, on the same day, in a larger sum. But will this court sift the evidence, and determine whether the witness contradicted his first statement which we have just quoted? His testimony which we have quoted tends to prove, indeed it actually proves our proposition, that the property transferred, the money paid, belonged to Reinhard & Company on the tenth day of April, 1900. That some other portions of the same witness' testimony may qualify or contradict these statements, is not material.

(2) Opposite counsel may deny that the transfer, the payment, of the $1161.74, was made by Reinhard & Company, or its agent, to the defendant in error. For instance, they may say that "this check" (meaning the check given by the manager of the clearing house to the defendant in error on the ninth day of April, 1900, for $1161.74, on Reinhard & Company's Bank) "was not

paid directly or indirectly to the City Deposit Bank by Reinhard & Company." The record shows that the manager on April 9, 1900, gave the defendant in error the check for $1161.74 on Reinhard & Company, because Reinhard & Company's bank owed the clearing house that amount, and more. The delivery of that check to defendant in error entitled it to go to Reinhard & Company and get that amount of money. It is true Reinhard & Company did not pay that check. But the defendant in error presented it at the clearing house the next day; it was cleared, and the amount which it represented was included in the balance ascertained to be due to the defendant in error.

Opposite counsel may say that "the manager paid it by giving the defendant in error a check on the Deshler National Bank for $4878.98, that amount embracing the $1161.74."

But unfortunately for the argument of opposite counsel, that condition was not, by it, permitted to stand. After the manager, who was the agent of the defendant in error, and also of Reinhard & Company, knew that Reinhard & Company, was insolvent, and after the defendant in error was informed by the manager that Reinhard & Company had made an assignment, and therefore, after it knew that Reinhard & Company was insolvent, the defendant in error surrendered the check on the Deshler National Bank for the $4878.98, and accepted from the manager a check for $1161.74 on the Capital City Bank, which represented that much of the balance due Reinhard & Company, as the manager testified, in the answers which we have quoted. The delivery of the check for $4878.98 on the Deshler

National Bank to the defendant in error counts for nothing; because it was surrendered, and there was substituted for it the other checks.

Opposite counsel may say that, when the manager "paid out his balance, Reinhard & Company received the credit for the amount of the checks which they had sent in against the other banks that day, to wit, $2132.18, although the balance found was against them. Otherwise, that balance would have been larger." What materiality is there in this fact? How does it aid the contention of defendant in error? The undisputed evidence, shows that the manager said there was that amount of money held by him as a credit of Reinhard & Company. No matter if the debits were larger than that credit, the fact is that Reinhard & Company had a credit of that amount in his hands.

Opposite counsel may next contend that the manager no longer had any credit under his control, in favor of Reinhard & Company, after he had distributed the checks upon which it was based to the messengers of the bank upon which they were drawn, and had drawn his clearing house checks upon the debtor banks. But the fact proved by the manager's evidence, is that the manager did not draw the two checks upon the balance that he had to the credit of Reinhard & Company until after he knew that Reinhard & Company was insolvent, and the defendant in error, and the Commercial National Bank, did not receive the two checks which disposed of, or distributed that balance due Reinhard & Co., until after each of them knew that Reinhard & Company had failed.

We emphasize the fact, that the manager swore (page 10 of the Record) that he gave the defendant in error a

check for $1161.74 on the balance he held to the credit of Reinhard & Company. Even if it is true, as opposite counsel may say, that the manager "virtually paid the clearing house for its check of the ninth, for $1161.74, when he found the balance that was due to Reinhard & Company, by putting the whole of their credits against the whole of their debits," what materiality is there in that fact?

That does not change the fact that, after he knew that Reinhard & Company had made an assignment, and was therefore insolvent, and that after he had informed the cashier of the defendant in error that Reinhard & Company had failed, he delivered a check in favor of the defendant in error against $1161.74 of the balance which he held against Reinhard & Company. And even if there was any materiality in such a fact, plaintiff in error was entitled to have the question settled by the jury. Neither of the courts below had the power to analyze and reconcile the evidence, and determine what part of the evidence of the manager was true, and what part was false.

The mode of doing the business at the clearing house, which may be dwelt upon by opposite counsel, is not material. It is not material, that the check which had been drawn on Reinhard & Company on the ninth of April, 1900, was cleared on the tenth day of April, and was not again paid by Reinhard & Company to the clearing house, or by anybody else. That does not alter the fact, that at the time the manager delivered the check to the defendant in error for $1161.74, he had a credit in favor of Reinhard & Company of $2132.19, and that he drew the checks against that balance, as he positively

testified (page 10 of the Record), one being for $1161.74 in favor of defendant in error.

Opposite counsel may say that, by reason of the delivery of the check on the Deshler National Bank, for $4875.98, to the defendant in error, "that bank" (meaning the Deshler National Bank) "and no other became and was the debtor of the City Deposit Bank to the full amount of all the checks cleared by the City Deposit Bank that day, including the one on Reinhard & Company, and the relationship of debtor and creditor between Reinhard & Company and the City Deposit Bank was obliterated."

The fallacy of this statement exists in the fact that simultaneously with the extinguishment of the "relationship" of debtor and creditor, between Reinhard & Company and the City Deposit Bank, money belonging to Reinhard & Company was paid, transferred, to the City Deposit Bank, to extinguish, to obliterate, that relationship. The obliteration of the "relationship" and the payment of the money belonging to Reinhard & Company were concurrent events.

Opposite counsel may deny our statement in former brief, that the amount of the check for $1161.74, given to the defendant in error on the ninth day of April, 1900, on Reinhard & Company, but not paid by the latter, "was added to the balance which was struck in favor of the defendant in error as owing to it from the clearing house."

We will prove by the record, by the evidence of the manager, which was uncontradicted by any other witness, because no other witness testified on the same subject, that our quoted statement is true, and that opposite counsel are in error.

On page 15 of the record, the categorical question was put to the manager, whether the amount of the check, $1161.74, given on the ninth of April, 1900, was included in the check, given on the tenth day of April, 1900, to the defendant in error for $3714.24, and he answered thus: "Yes, included in that." True, he afterwards attempted to change this, but in point of fact, did not change the statement about the balance; for, afterwards, he said: "I took to him" (Jennings, the cashier of the defendant in error) "a check on the Deshler National Bank for $3714.24, and one on the Capital City Bank for $1161.74." This demonstrates that the amount of the check, $1161.74, given on the day before to the defendant in error against Reinhard & Company, was included in the balance found, on the next day, to be due to the defendant in error (page 16 of the Record).

Before the manager did this, however, he gave the defendant in error a check for $4875.98 on the Deshler National Bank. These two checks, one for $3714.24, and the other for $1161.74, were substituted for the check first given for $4875.98. (Same page of the Record.)

On page 16 of the Record, the manager repeated what he had said about the $1161.74 belonging to Reinhard & Company, by stating that the check for $1161.74 (designated as "$1100.00 and something") on the Capital City Bank, represented a part of the moneys at that time due from the clearing house to Reinhard & Company.

There is more testimony of the manager which demonstrates that opposite counsel will be mistaken, if they deny the statement quoted from our former brief.

On page 25 the manager said that the amount of the check on Reinhard & Company, for $1161.74, given the

day before, to the defendant in error, was not included in the check on the Deshler National Bank for $4875.98. But on the same page he stated that the check, drawn the day before on Reinhard & Company, for $1161.74, in favor of the defendant in error, was paid when he made the balance in favor of the defendant in error; and he also said that, after the $1161.74 was deducted from what was coming to the defendant in error, "that would leave them a balance of $3714.24," (erroneously designated as $1100.00 in the answer); and he further said that, at the time he drew the check for $4875.98, "the Reinhard check was treated as paid." And again on page 26 the witness said: "After deducting the Reinhard check that was returned, the clearing house only owed them" (defendant in error) "3714.00." The witness, of course, meant $3714.24; the cents were omitted for convenience. These quotations from the evidence of the manager absolutely demonstrate the error of opposite counsel if they should deny the statement quoted from our former brief.

Afterwards, about two more hours afterwards, the check for $4875.98 was surrendered, and for $1161.74 of it, a check for that amount against the balance in favor of Reinhard & Company, was substituted. But even if the testimony is contradictory, plaintiff in error was entitled to have the testimony weighed, balanced and reconciled by the jury, and not by the courts.

Opposite counsel may say: "There is no evidence tending to show that the amount due from the clearing house to that bank" (Capital City Bank) "was in any sense of the word a balance in favor of Reinhard & Company. It was a balance in favor of the clearing house, and not

in favor of any single member thereof." But this has no relevancy to the case nor to the argument. The manager had repeatedly said that he gave a check to the defendant in error, on the tenth day of April, 1900, after two o'clock in the afternoon, for $1161.74, and that that was for a part of the balance due to Reinhard & Company. The fact that the mode of transferring that amount of money was by giving a check on the Capital City Bank for an equal amount, that being a bank which owed the clearing house, does not alter the fact that it was taken from the balance due to Reinhard & Company. True, it was a circumlocutory way of paying money that belonged to Reinhard & Company. It was, nevertheless, a payment to defendant in error of that money due to Reinhard & Company; and no twisting or perversion of the evidence can change the fact.

Opposite counsel may make an effort to show that the manager violated the rule of the clearing house. Even if that were true, it did not substract anything from the right of the plaintiff in error to have the case submitted to the jury. The other courts had no right to decide, as a matter of law, that the manager had violated the rule. But there was no violation of a rule committed by the manager. There was no law, nor was there any agreement made between the different banks composing the clearing house organization, that compelled the rules to be reduced to writing.

On page 20 the manager explicitly testified that he was invested with the "discretion" to give any creditor bank a check on any of the debtor banks. The vesting of such power or discretion in the manager was just as much

a rule of the clearing house as the written rule which was quoted in the evidence. If there was a conflict between the rule that vested him with the discretion which the manager possessed and the rule quoted in the evidence, it raised a question which should have been submitted, under proper instructions, to the jury. It did not raise a question of law which it was the exclusive province of the lower courts to determine.

Opposite counsel discuss the evidence of the manager, which tended to show that defendant in error, through its cashier, Jennings, knew that Reinhard & Company was insolvent, when the check for $1161.74 against that much of the balance due to Reinhard & Company was delivered to it. They may endeavor to make out that the manager contradicted himself upon that subject. But such a conflict or contradiction in his testimony did not authorize the Common Pleas Court to take the case from the jury; nor did it authorize the Circuit Court to affirm the judgment of the lower court. It may or not be true that the manager contradicted himself upon this subject; but we reiterate that if there were such contradictions they did not authorize the trial court to arrest the testimony from the jury. The record shows (page 14) that the manager swore, thus:

"I told him" (Jennings, the cashier of the defendant in error) "that the Reinhards had failed, and that this check had been returned, and that I had a balance due Reinhard & Company, and that I substituted a check on the Capital City Bank for this check on Reinhard which had been returned." He did not say in his testimony that that statement was untrue, as to the failure of Reinhard &

Company. He only said he could not remember that he told Jennings that he wanted to substitute one check for the other, and he only said he was not sure that he said anything about the failure. That was not a contradiction of his former statement. He expressly stated (page 17 of the Record): "It runs in my mind * * * that he asked me what for, and I told him not to ask any questions." That information, in itself, was enough to put a reasonable man upon inquiry, such as Jennings was, and it was enough to put the duty upon him of inquiring what the condition of Reinhard & Company was, before accepting the check for the balance due that company, in disregard of the rights of the other creditors of the company.

Opposite counsel may say:

"But suppose he had told Jennings of the failure; the City Deposit Bank had been paid the balance due to it from the clearing house two hours before by a check for the full amount on a solvent bank which owed the clearing house a far greater amount." But, unfortunately for opposite counsel, their client did not stay paid by the check on the Deshler National Bank for $4875.98; it surrendered that check and took in place of $1161.74 of its amount, a check for an equal amount on another bank, against the balance due Reinhard & Company.

Opposite counsel may say that the manager "was not conscious that in making that substitution of the two checks for the one he was going beyond his authority." But suppose he did exceed his authority; how does that help the defendant in error? The fact is, as the evidence shows, that he did pay $1161.74 of the balance due Rein-

hard & Company to the defendant in error. The question, whether he had authority to do so, is not germane. As the agent of Reinhard & Company (because he was the agent of all the banks forming the clearing house) he had apparent authority; but he had no authority to violate the bankrupt law. His violation of that law is our case.

Opposite counsel may say: "In what respect was the City Deposit Bank any better off after that unauthorized visit of Field than it was before? The bank, we repeat again, had received payment of all the amount due it from the clearing house for that day, two hours before, by check for $4875.98, on the Deshler National Bank."

But defendant in error did not remain paid in that way. The check for $4875.98 was surrendered to the manager; it ceased to have any legal vitality for any purpose. The bank did not remain paid with that check. By surrendering the check it placed itself in its former position, and accepted in place of it two other checks, one for $1161.74, being against that much of the balance due to Reinhard & Company.

Opposite counsel may say:

"The evidence does not show that the City Deposit Bank received anything from, or was benefited by any act of Reinhard & Company, and it further shows that neither the City Deposit Bank nor any agent acting therein, had reasonable cause, or any cause, to believe that by an act of Reinhard & Company it was intended thereby to give a preference." Is this true? We submit that the evidence not only tends to show, but does show, that opposite counsel are mistaken on both of these propositions. The manager swore, again and again, that he drew the

check in favor of the defendant in error for $1161.74, against that much of the balance due Reinhard & Company. We proved that the defendant in error received that amount of money, or credit, which belonged to Reinhard & Company. It is immaterial whether it is called money or a credit. That check was delivered to the defendant in error by the manager of the clearing house, an agent of Reinhard & Company, as this court has decided; or it was delivered to the defendant in error by a trustee for Reinhard & Company, according to the articles of agreement between the different banks composing the clearing house. (Page 28 of the Record.) And yet counsel may seriously say that the defendant in error did not receive anything from Reinhard & Company. It is a hypertechnical defense, that the money or credit did not come directly from Reinhard & Company. It is not based upon substance. The theory of opposite counsel has been repudiated by the Federal Courts and other courts which have decided cases of voidable preference. The court, for example, in Crooks vs. People's National Bank, 46 App. Div., 339, 61 N. Y. Supp., 604, said:

"It is the result or the effect of the act done which is declared against, not the manner or method by which it is done. No matter how circuitous the method may be, if the effect of a transfer of property made within four months before the filing of a petition in bankruptcy, is to enable any of the bankrupt's creditors to obtain a greater percentage of his debt than others of the same class, then such transfer is voidable, if the person receiving it or to be benefited thereby had reasonable cause to believe that it was intended thereby to give a preference."

To constitute a voidable preference, it is immaterial who pays the money or makes the transfer of the property

of the bankrupt to the creditor. If the money or the property came out of the assets of the bankrupt, that is sufficient. This is the test, and the case at bar comes up to the test.

The manager of the clearing house, who was the agent of the defendant in error, according to this court's decision quoted, and who was the trustee of the defendant in error, according to the articles of agreement between the different banks, constituting the clearing house, more than an hour before he delivered the check for $1161.74 against the balance due Reinhard & Company to the defendant in error, knew that Reinhard & Company had made an assignment, and consequently was insolvent. The evidence of the manager shows that he notified Jennings, the cashier of the defendant in error, before he took up the check on the Deshler National Bank for $4875.98, and substituted for it, in part, the check for $1161.74 against the balance due Reinhard & Company, that Reinhard & Company "had failed." The evidence, we emphasize, not only tended to prove these facts, but it actually proved them; and yet, opposite counsel, in the face of these facts, may seriously say to the court that neither the defendant in error, nor any authorized agent had reasonable cause to believe that a preference was intended. This evidence unequivocally demonstrated that the defendant in error, at that time, knew that Reinhard & Company was insolvent. At least it is true, that the information furnished to the cashier was sufficient to put him upon reasonable inquiry. It became his moral and legal duty, upon receiving such information, to make an inquiry, and to be diligent in making the inquiry as to

the situation, resources, etc., of Reinhard & Company, before accepting a check on the balance which the manager told him he had in favor of Reinhard & Company.

Opposite counsel may say:

"There is no evidence of any kind tending to show that the balance had any relation whatever to the transactions of the clearing house with Reinhard & Company. The manager made no such claim or explanation."

These statements are not sustained by the evidence; on the contrary, they are contradicted by the evidence. There is not a syllable of evidence which even tends to sustain either one of them. They mean the "balance in favor of Reinhard & Company." The manager, repeatedly, said there was a balance in favor of Reinhard & Company, and he fixed the amount at $2132.19. More than once he testified that he disposed of that balance in favor of Reinhard & Company, by dividing it into two parts, by giving the defendant in error a check for $1161.74, and by giving the Commercial National Bank a check for $970.45.

On page 10 of the record, it is shown that the categorical question was put to the manager, "What was done with the balance?" and his answer was: "Well, I gave a check to the City Deposit Bank for twelve hundred or thirteen hundred dollars; I could tell you the exact amount if you want me to get the book." In answer to the next question he said the amount was $1161.74.

On page 11 of the Record, it is shown that he was asked whether any part of the $2132.19 was paid to Reinhard & Company; and next he was asked this question: "They were all paid to these two banks, weren't they?" and his answer was: "Yes."

The next question was: "It was all paid to these two banks?" to which he answered, "Yes, given to these two banks."

That is to say, the balance of $2132.19 was "paid," "given," to the two banks, the defendant in error, and the Commercial National Bank, a check for $1161.74 being given to the former, and a check for $970.45 to the latter. It is unnecessary to repeat quotations from other pages of the record, which show that the manager made this same "claim," and "explanation" several times.

Opposite counsel may say that defendant in error, "upon its settlement with the clearing house at noon had no reasonable cause to suspect that it was receiving a transfer or conveyance of property from Reinhard & Company, or that it was then or had received a preference from Reinhard & Company; and that it did not at that time have or receive any information which should have put it upon inquiry as to the financial condition of Reinhard & Company."

The first of these statements is unconditionally contradicted by the record. By the second statement they miss the issue.

The question is, had the defendant in error reasonable cause, etc., at the time the check for $1161.74, against the balance in favor of Reinhard & Company, was delivered to it by the manager, and at the time it surrendered the check on the Deshler National Bank for $4875.98? The evidence of the manager not only tended to prove, but it did in fact prove, that, at that time, the cashier of the defendant in error knew that Reinhard & Company had "failed," and therefore the defendant in error had reasonable cause to believe that the Company was insolvent. If

it had reasonable cause to believe that it was insolvent, it knew that it was getting a preference. It knew that an insolvent bank would never pay its creditors in full.

Opposite counsel may say: "Under the evidence would not the clearing house have the right to set off against the trustee of Reinhard & Company?" But what relevancy has that to the case under discussion? It would not be competent for any court to consider a question of set-off in favor of the clearing house, in a case against the defendant in error. Besides, no such defense was made in the answer.

Opposite counsel may say that when the manager, at noon, April 10, 1900, took up its own check for $1161.74, delivered the day before to the defendant in error, that check was paid for by the manager giving a check to the defendant in error for $4875.98 on the Deshler National Bank. Then they may add: "By the striking of these balances either that check for $1161.74 was paid to the clearing house, or it became a debt of Reinhard & Company to the clearing house, and the proper subject for set-off against the credit on the clearing house books." But the defendant in error has no right to make a defense based on the counter-claim or set-off that the clearing house might have against Reinhard & Company, or to make a defense which was not pleaded.

The plaintiff in error could not have maintained an action against the clearing house; the express provision or stipulation in the articles of agreement entered into by the banks composing the clearing house, which expressly provided that "in no case is the association to be held responsible for any loss that may occur," would have defeated such an action.

The decision rendered by this court in Keystone National Bank vs. George Philler, 167 U. S., 345, does not support any pretension made by the defendant in error. The decision was based upon the construction of the National Bank statute. The bankrupt law was not construed by the court; the case did not arise under the bankrupt law. However, one of the resolutions of law reached by the court was that, even under the national banking law, a lien for a balance which accrued from transactions had after notice of insolvency could not, and would not be enforced.

Respectfully submitted,

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(19,561.)

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 132.

FRED. C. RECTOR, Trustee of Rowland & Company,
Plaintiff in Error,

vs.

THE CITY DEPOSIT BANK COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

Brief for Defendant in Error.

TALLMADGE P. EVEN,
OLIVER LAFF & THOMAS,
Attorneys for Defendant in Error.

(19,561.)

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 137.

FRED. C. RECTOR, Trustee of Reinhard & Company,
Plaintiff in Error,

vs.

THE CITY DEPOSIT BANK COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

Brief for Defendant in Error.

STATEMENT.

On the 1st day of December, A. D. 1900, plaintiff in error filed in the Common Pleas Court of Franklin County, Ohio, his petition (see page 7 of Record), alleging his appointment and qualification as trustee of Reinhard & Company, bankrupts, and avering that on April 10th, A. D. 1900, said Reinhard & Company, then being bankrupts, assigned and transferred to defendant in error, the sum of thirteen hundred dollars ($1300.00), (the correct amount afterwards being agreed to be $1161.74), for the purpose of giving an unlawful and fraudulent preference to defendant in error, and alleging further that said assignment was received by defendant in error for the purpose of securing such unlawful preference, and in fraud of the creditors of Reinhard & Company.

The action was an ordinary action at law under the Ohio Code. Issue was joined in said action, and on the 3rd day of March, A. D. 1902, the cause was tried to a jury duly empaneled, and resulted in a judgment in favor of defendant in error. (See Record pages 5 and 6). Subsequently the cause was duly taken on error to the Circuit Court of Franklin County, Ohio, and from there to the Supreme Court of the State of Ohio, the judgment of the Common Pleas Court being affirmed by the Circuit Court, and the judgment of the Circuit Court being affirmed by the Supreme Court of the State of Ohio.

The sole question at issue, as presented by the pleadings in the Common Pleas Court, was whether or not the alleged transfer was, in fact, an unlawful and fraudulent preference to the defendant in error.

ARGUMENT.

The Record Shows that this Court has no Jurisdiction to Review the Judgment of the Supreme Court of Ohio.

Nowhere in the pleadings, evidence, or Court proceedings below, does it appear that any Federal question was raised by plaintiff, or any right, title or privilege set up, or claimed by him, under any law of the United States, which would make this case reviewable under Section 709 of the Revised Statutes of the United States, or give this Court jurisdiction over the same.

The first place any such claim is made by plaintiff in error, is in the certificate of the Chief Justice of Ohio, (page 34 of Record), the writ of error (page 38 of Record), and the assignment of errors, (page 39 of Record.) Up to this time there is nothing in the Record showing that plaintiff in error claimed that there was "drawn in question the validity of the Bankrupt Statute of the United States of 1898," or "the construction of said Statute," or that "the decision was against the validity of the said Statute and against the right, title and privilege set up and claimed in said suit."

The petition of plaintiff below, (See Record page 7), set up an ordinary cause of action at law, and sought to have an alleged unlawful preference set aside. The petition did not allege or claim that this unlawful preference was in violation of the Bankruptcy Act of 1898, or of any other Statute of the United States. For all that appears in the petition, plaintiff in error might have been proceeding under the Insolvency Laws of the State of Ohio, then in force, which would give him a right of action such as was set out, and would give him the relief claimed. See Sections 6343 and 6344 of the Revised Statutes of Ohio, Edition of 1900, 93 O. L. 290, set out in full in Supplement hereto.

At no period in the proceedings was the validity of the Bankruptcy Act drawn in question, nor was there any question raised at any time as to the construction of that Act. The constitutionality of the law was not attacked, nor does the Record show that any question or claim of right,

privilege or title arising under the Act, or arising under any Statute of the United States, was made by plaintiff in error, or considered by the Court.

The case proceeded as an ordinary action at law, and the sole question was a question of fact. The right of plaintiff in error to the relief sought, whether under the Bankruptcy Act, or under the Insolvency Act of Ohio, was not denied, and had he been able to prove the allegations of his petition to the satisfaction of the Court, judgment would have been rendered in his favor.

It is evident from an inspection of the Record, that no thought of a Federal question occurred to counsel for plaintiff in error, until after the decision of the Supreme Court of Ohio had been rendered.

Having submitted to the jurisdiction of the Ohio Courts, and having failed at any stage of the proceedings to indicate to those Courts that a Federal question was involved, or that some right or title was claimed under a Statute of the United States, plaintiff in error is not entitled, under the rulings of this Court, to have the decision of the Court below reviewed.

In order to entitle him to relief, the Record must affirmatively show that the Federal question was raised, or the right or title claimed.

In the case of *Sayward v. Denny*, 158 U. S. 180, it is held that there must be a "definite issue as to the possession of the right distinctly deducible from the Record, before the State Court can be held to have disposed of such Federal question by its decision."

The same case holds that the certificate of the presiding judge of the State Court cannot of itself confer jurisdiction upon this Court to re-examine the judgment, and that the petition for the writ of error forms no part of the Record upon which action can be taken here.

> "To render a Federal question available on writ of error to the State Court, it must have been raised in the case before judgment and cannot be claimed for the first time in a petition for re-hearing."
>
> *Turner v. Richardson*, 180 U. S. 87.
>
> See also *Yazoo & M. R. Co. v. Adams*, 180 U. S. 1.

The question cannot be raised for the first time in the assignment of error.

Jacobi v. Alabama, 187 U. S. 133.
Johnson v. Insurance Co., 187 U. S. 491.

"A writ of error to a State Court must be dismissed where no Federal question was raised in the Record, and the case was disposed of in the State Courts on a ground wholly independent of a Federal question."

N. Y. Central & Hudson River R. R. Co., v. City of N. Y. 186 U. S. 269.

Conceding, however, for the sake of argument, that the petition filed by plaintiff in error should be considered as if it had directly alleged a preference in violation of Sections 60a and 60b of the Bankruptcy Law of 1898, the facts disclosed by the Record do not in that case, bring the action within the jurisdiction of this Court.

It was not decided by the Court below that the Bankrupt Act of 1898 was invalid, nor was the validity of that Act drawn in question, nor was the right of plaintiff to recover under that Act, in case the facts were such as to warrant recovery, denied by the Supreme Court of Ohio. All the Court did was to find, upon the facts presented to it, that plaintiff in error had failed to prove a case of unlawful preference. The Court did not deny the right of action, but did find that the facts did not constitute a cause of action.

This Court will not review on error mere questions of construction of Federal Statutes, or applications of facts to those Statutes, when the validity of the Act or Statute is not involved, and where no right to proceed under the Statute is denied by the State Court.

In *Cameron v. United States*, 146 U. S. 533, it is held:

"Where no question is raised as to the validity of a Statute of the United States, but merely as to the application of the Statute to the case, no Federal question arises."

To the same effect, see

Choteau v. Marguerite, 12 Peters, 509;
Cook Co. v. Dock Co., 138 U. S. 635.
Osborne v. Florida, 164 U. S. 650;
Kinnard v. Nebraska, 186 U. S. 304;

In the latter case, the Court say:

> "But the validity of the Acts of Congress referred to was not drawn in question by the facts of this controversy. Our jurisdiction to review the judgment of the State Court rests upon Section 709 of the Revised Statutes. It has often been held that the validity of the Statute or treaty of the United States is not 'drawn in question' within the meaning of Section 709 every time rights claimed under a Statute or treaty are controverted. Nor is the validity of an authority every time an act done by such authority disputed."

A large number of cases are cited by the Court in support of this proposition.

In the very recent case of *Thompson v. Fairbanks*, 196 U. S., 516, it seems to us the identical question under consideration was decided by this Court.

That was a case brought by a trustee in bankruptcy in the local Courts in Vermont against the defendant, Fairbanks, to recover from him the value of certain personal property alleged to have belonged to the bankrupt, and to have been fraudulently converted by the defendant to his own use in violation of the Bankruptcy Act.

In the case at bar in the Court below the defendant in error was charged with having fraudulently and unlawfully obtained a preference and converted to its own use certain personal property, to-wit: monies, alleged to have belonged to the bankrupts' estate.

The Court in the Fairbanks case say, on page 523:

> "The question whether the conveyance, etc., was in fact made with intent to defraud creditors when passed upon in the State Court, is not one of a Federal nature."

There can be no distinction made between a conveyance with intent to defraud creditors, and an unlawful and fraudulent payment with intent to create a preference. If the one question is a question to be construed by the State Courts alone, and not subject to Federal revision, so is the other.

To the same effect is the case of *Dresser v. Wilson*, 195 U. S. 409. The Court on page 416 say:

> "We have repeatedly held that, when the question in a State Court is not whether if the bankrupt had title it would pass to his assignee, but whether he had title at all, and the State Court decided that he had not, no Federal question is presented."

In this case the question was not whether if the bankrupt, Reinhard, had title to the money in question it would pass to the trustee in bankruptcy, but the question was, whether at the time of the assignment in bankruptcy, the bankrupt had any title at all to this particular fund. This question the State Court decided adversely to the trustee, and this question is distinctly within the ruling above quoted.

The case of *McKenna v. Simpson*, 129 U. S. 506, is also in point. That was a suit brought by an assignee in bankruptcy to set aside a fraudulent conveyance. The Court held that it was an action which might have been brought in the United States Court direct, but that having been brought in the State Court, and no decision having been rendered in the State Court against the validity of any Statute of, or authority exercised under the United States, or immunity claimed under the Constitution of the United States, this Court had no jurisdiction to review the State decision. It was held further, that the decision of the State Court as to what should be deemed a fraudulent conveyance, does not present any Federal question, nor does the application by the Court of the evidence in reaching such decision, raise a Federal question.

Following out the suggestion of the Court in the McKenna case, as we have already intimated, there was ample authority under the Insolvency Laws of Ohio, above referred to, for the plaintiff in error, as trustee, to have proceeded under those Insolvency Laws to have the alleged preference declared void. From all that appears in his petition, or the Record in this case, he may have done so. The Court will have to read into his petition something not found therein in order to find affirmatively that he was proceeding under the Bankruptcy Act, and not under the Insolvency Laws. Under this state of facts, plaintiff in error certainly cannot claim that the Court below, or this Court, should of its own motion, determine what was in his mind when he filed the suit, and determine for him, without his own assertion or pleading, that he was intending to proceed under a Federal Statute, and not under the State Statute.

Under the rule announced in *Kaufman v. Treadway*, 195 U. S. 271, the decision of the Supreme Court of Ohio confirming the lower Courts, is final, and not subject to review by this Court. Mr. Justice Brewer, in delivering the opinion of the Court on page 273 says:

> "Whether the bankrupt was insolvent on August 4th, 1898, when he paid the money to his brother, the defendant, and whether the latter had reasonable cause to believe that it was intended to give a preference, are questions of fact determined by the verdict of the jury, and not open to review in this Court."

For these reasons, this Court has no jurisdiction of this cause, and the writ of error should be dismissed.

ARGUMENT UPON FACTS.

Should the Court determine that plaintiff in error has a right to have the decision of the Supreme Court of Ohio reviewed, and that this is a case where this Court has jurisdiction, it then becomes necessary to consider whether or not the decision of the Court below was correct, and whether, upon the evidence set out in the Record, plaintiff in error is entitled to a reversal of the judgment of the Court.

In order to properly consider the question, a statement of the facts established by the evidence, is necessary. Without attempting to quote the testimony set out in the Record, a fair summary of those facts is as follows:

On April 10th, A. D. 1900, Reinhard & Company, a partnership, doing a general banking business, and the individual members of that partnership, committed an act of insolvency by filing in the Probate Court of Franklin County, Ohio, at 12:15 o'clock P. M., an assignment of all of their property under the Insolvency Laws of the State of Ohio.

Subsequently, on the 11th day of April, 1905, an involuntary petition in bankruptcy was filed in the United States Court, praying that said Reinhard & Company might be adjudged bankrupts, and on the 10th day of August, 1900, they were, by that Court, so adjudged to be bankrupts.

In April, 1900, there was in the City of Columbus, an Association of banks known as the Clearing House Association; that its purpose was the effecting at one place, the daily exchange between the several members thereof, and the settlement of the balances resulting from such exchanges; that said settlements were effected as follows: Each bank, a member of the Association, at a stated time, 12 o'clock on every day, presented all checks drawn upon other banks and paid by it since the meeting of the previous day, accompanied by a statement of the amount held by it against each of the other banks. After having verified such statement, the manager of the Association would figure the total amount of the checks presented by the other banks against the bank whose account was under consideration. In this manner

he would determine whether the bank whose account was under consideration was a creditor or a debtor of the Association. This determined, he would then draw what were known as Clearing House checks upon the debtor banks in favor of the creditor banks, and thus effect the settlements for the day. Under the rules of the Association these checks might be presented for payment to the banks on which they were drawn, or might be presented to the Association for clearance on the day following their receipt; that the defendant in error, the City Deposit Bank, The Deshler National Bank, and Reinhard & Company were members of the Clearing House Association.

On the 9th day af April, 1900, the day before the act of bankruptcy was committeed by Reinhard & Company, and before there was any intimation from any source of their insolvency, so far as appears by the evidence, the defendant in error presented to the Clearing House Association, for clearance, a large number of checks, none of which, so far as is shown by the record, were drawn upon or payable by Reinhard & Company, but were drawn upon and payable by other banks. The statements for that day, April 9th, 1900, show defendant in error to have been a creditor of the Clearing House Association in the sum of $10,245.63, it having presented checks on other banks to that amount in excess of the checks presented by other banks against it. For the purpose of satisfying this indebtedness of the Association, and effecting a settlement with the defendant in error for that day, the manager thereof, gave to the defendant in error, two Clearing House checks, one for $9,083.89, drawn upon the Capital City Bank, and one for $1,161.74, drawn upon Reinhard & Company. This closed the transaction between the defendant in error and the Association for that day.

The evidence further established the fact that at the meeting of the Association at 12 o'clock on the following day, April 10, 1900, and before the assignment of Reinhard & Company, the defendant in error presented for clearance a large number of checks, among them, the Clearing House check for $1,161.74, drawn upon and payable by Reinhard & Company, received by the defendant in error from the

Clearing House Association in the settlement of the previous day; that this check was the only one drawn upon Reinhard & Company, presented by defendant in error on April 10th, 1900; that the balance on the said 10th day of April, 1900, shows the defendant in error to have been a creditor of the Association in the sum of $4875.98, and that for the purpose of satisfying this indebtedness, and of effecting a settlement for that day with the defendant in error, the manager of the Clearing House Association gave to the defendant in error, a clearance check for the said sum of $4875.98, drawn upon and payable by the Deshler National Bank. The delivery of this check was completed prior to the assignment of Reinhard & Company, and settled the account between the Association, and the defendant in error for that day. The balance had been struck, and the defendant in error, a creditor had been paid, and neither checks nor money belonging to Reinhard & Company were involved in the transaction.

The evidence further shows that simultaneously with this transaction, the Manager of the Clearing House Association received from Reinhard & Company for clearance, checks to the amount of $2,132.19, which he, for the purpose of effecting the settlement for that date between the Association and Reinhard & Company, properly appropriated to the reduction of the total amount then to be charged against Reinhard & Company on account of checks presented by other banks against it. This settlement, as that with the defendant in error, was effected prior to the assignment of Reinhard & Company. During the afternoon of April 10th, 1900, between two and three o'clock, and after he had learned of the assignment of Reinhard & Company, the Manager of the Clearing House Association went to the banking house of the defendant in error, taking with him two clearance checks, one drawn upon and payable by the Deshler National Bank, and being for the sum of $3,714.24, and the other drawn upon and payable by the Capital City Bank, and being for the sum of $1,161.74, and asked the cashier of the defendant in error to exchange therefor the check received that day from the Clearing House Associa-

tion, and being for the sum of $4,875.98, and drawn upon and payable by the Deshler National Bank, and such exchange was actually made.

The evidence adduced on the trial fails to show why such action was taken by the Manager of the Clearing House Association, but neither the absence of a reason nor the action itself can have any bearing upon the issues involved in this case. The settlement between the Association and the defendant in error for that day, April 10, 1900, had been completed, and the mere exchange of checks thereafter could not in any way have affected it.

We desire to call the Court's particular attention to the fact that on the 9th day of April, 1900, the day before the assignment of Reinhard & Company, no relation of debtor or creditor existed between Reinhard & Company, and the City Deposit Bank. None of the checks presented on that date to the Clearing House Association by the City Deposit Bank for clearance, were drawn upon or issued by Reinhard & Company. The check received by the City Deposit Bank upon that date from the Clearing House Association, and being the check in controversy, arose out of a general balance due from the Clearing House Association to the City Deposit Bank, and not from any checks or transactions directly between Reinhard & Company, and that bank.

Had the City Deposit Bank on the afternoon of the 9th of April, 1900, and before the close of business hours, chosen to adopt the antiquated method of presenting checks for payment, and sent its messenger to Reinhard & Company to carry through the streets the $1,161.74 in gold or in currency, no possible question as to a preference could have arisen. The transaction would have been a completed one in the ordinary course of business, and there being no evidence at that time of the insolvency of Reinhard & Company, no preference could possibly have been claimed.

The City Deposit Bank did not choose to adopt this method, but did, under the rules of the Clearing House Association, present this check on the next day, within the usual time, for clearance, and it was cleared at 12 o'clock, and before the assignment of Reinhard & Company, and

before any notice to defendant in error of the insolvency of Reinhard & Company.

Again it will be noted, that on this subsequent day, the 10th of April, 1900, no checks drawn upon Reinhard & Company, or by it, other than this Clearing House check of the day before, were in the possession of the City Deposit Bank, and no direct relation of debtor or creditor existed between the two banks other than the Clearing House check.

In other words, at no time upon either of these days, was there in the possession of the City Deposit Bank any obligation of Reinhard & Company in which it was directly interested, or which had come to it, in the usual course of commercial business, and it had on neither of these days, arising out of any direct transaction between it and Reinhard & Company, any monies or credits of or belonging to Reinhard & Company.

The result of the Clearing House meeting on April 10th, 1900, was the check issued to the City Deposit Bank by the Clearing House Manager upon the Deshler National Bank of Columbus, for the sum of $4,875.98. Whatever relationship of debtor or creditor might, by any stretch of the imagination, be construed to have existed up to this time, between Reinhard & Company and the City Deposit Bank, arising out of the Clearing House check of the day before, that relation, by this action of the Clearing House Manager, and the issuance and acceptance of this check upon the Deshler National Bank, in the usual course of business, immediately ceased, and all this before the insolvency, of Reinhard & Company. In this case, had the messenger of the City Deposit Bank chosen to present the check for $4,875.98 for payment, payment could not have been refused, and the currency or gold being handed to the messenger of the City Deposit Bank, would have, irrevocably, completed the transaction, and neither the Deshler National Bank nor Reinhard & Company could, under any circumstances, have recovered one cent of the money from the City Deposit Bank. The mere fact that the check was not so presented, but was taken back to the City Deposit Bank in the usual

course of business, did not change the condition of affairs in the least.

After it became known by the Manager of the Clearing House Association that Reinhard & Company had made an assignment, for some reason of his own, without any request from the City Deposit Bank, and without any knowledge on the part of the City Deposit Bank that Reinhard & Company had failed, other than that obtained from the Manager of the Clearing House Association at the time the exchange was made, the Manager voluntarily requested that this check for $4,875.98, drawn upon the Deshler National Bank, and in no way connected with Reinhard & Company, be given up, and the City Deposit Bank take in lieu thereof two checks, one upon the Deshler National Bank for the sum of $3,714.24, and the other upon the Capital City Bank of Columbus, for the sum of $1,161.74.

In other words the request being, that the City Deposit Bank substitute for its claim against one solvent bank, two claims against two solvent banks, neither of them in any way connected with, nor so far as the City Deposit Bank knew, having any relation of debtor or creditor with Reinhard & Company, the City Deposit Bank might have refused to make this exchange had it so desired, but having, made it, cannot thereby be held to have changed in any respect its relation to Reinhard & Company. The transactions with Reinhard & Company, so far as the City Deposit Bank was concerned, had been finished by the presentation of the Clearing House check of the day before, and the clearance of the same, and all relations between it and Reinhard & Company ceased absolutely, on April 9th, 1900, if any such relations ever existed.

Any other construction placed upon this transaction, and any decision by which the City Deposit Bank should be held to pay to Reinhard & Company this sum of $1,161.74, would result necessarily in the City Deposit Bank taking that sum out of the monies belonging to its depositors and stockholders, and giving it, without consideration, to the creditors of Reinhard & Company, for the reason that no direct transactions on either of the days mentioned, are

shown by the Record to have existed between the two banks in question. That this is the view taken by the Courts below, is manifest.

It may not be amiss in this connection to examine a little more carefully the effect of the Clearing House proceedings, at or about 12 o'clock of April 10th, 1900, and before the assignment of Reinhard & Company.

As already indicated, and as appears from the evidence of the Manager of the Clearing House, in his cross-examination on pages 19, 20, 21, 22, and 23, of the Record, certain checks upon other banks in the City of Columbus were brought to the Clearing House before 12 o'clock by the messenger of the City Deposit Bank for clearance, among which checks was the Clearing House check of $1,161.74 upon Reinhard & Company, drawn by the Manager of the Clearing House the day before, and other checks, none of which, however, excepting the one Clearing House check, was upon Reinhard & Company.

In settlement of these balances, and in the due course of business, the Clearing House Manager, before any notice of the assignment of Reinhard & Company, and before that assignment had actually been made, balanced his accounts and found a general credit balance of $4,875.98, due the City Deposit Bank, and gave his check as Manager of the Clearing House upon the Deshler National Bank for that amount. By this transaction the whole matter of the previous day was closed up. All transactions between the City Deposit Bank, The Clearing House, and Reinhard & Company were settled, and the City Deposit Bank had in its possession its check on the Deshler National Bank, which was, in effect, an indebtedness of the Clearing House Association itself.

If any recourse of any kind is to be had against any person by the trustee of Reinhard & Company, it is against the Manager of the Clearing House, or against some bank or banks, members of the Clearing House Association, which obtained a benefit on that day from the general clearances in which the Reinhard Bank was concerned, and not against the defendant in error.

In this connection the rule of the Clearing House Association, admitted and read in evidence, (see Record page 28) is applicable. That rule is as follows:

> "In case of failure to respond promptly to the checks of the manager, on the part of any member of the Association, they shall be immediately returned to the manager who shall call upon the other banks or bankers to make up the sum for which payment has been refused in proportion to the amount of checks upon the defaulting member sent into the clearing house at the *preceding* settlement, which sums so furnished or contributed shall constitute claims in the hands of the responding members respectively against the defaulting members, and it is hereby agreed that the checks received from the clearing house by the defaulting members, shall be delivered, if required, to the member owning the same without mutilation; the agency of the clearing house in the matter, it is understood, is only as a trustee, and in no case is the Association to be held responsible for any loss that may occur."

A plain interpretation of this rule is, that in case of Reinhard & Company defaulting as it did in the payment of the Clearing House check of $1,161.74, it was the duty of the Manager of the Clearing House to call upon the other banks belonging to the Association, to make up that check in proportion to the amount of checks upon Reinhard & Company which they had sent into the Clearing House at the *preceding* settlement, upon April 9th, 1900.

It no where appears from the evidence that among the checks presented by the City Deposit Bank to the Clearing House for clearance on the preceding day, April 9th, 1900, was there a single check, in any amount, due to them from Reinhard & Company, but on the contrary, the evidence, considered as a whole, affirmatively shows, as we have indicated above, that among these checks there was no amount due from Reinhard & Company.

This being the case, under no circumstances could the City Deposit Bank be called upon under this rule, to con-

tribute anything to the dishonored check of $1,161.74. Any claim for that check by the trustee in bankruptcy should be made alone upon the Clearing House, or upon such banks as had such credits on the preceding day.

NO INTENTION TO OBTAIN PREFERENCE IS SHOWN BY THE EVIDENCE.

A careful inspection of the Record fails to disclose any intention on the part of the City Deposit Bank to obtain a preference by the transaction on the afternoon of April 10th, 1900. If the Manager of the Clearing House went to the City Deposit Bank and notified the cashier that Reinhard & Company had made an assignment, the City Deposit Bank then had in its possession, no evidence of indebtedness of any kind given by Reinhard & Company, and no monies of or belonging to it. What the City Deposit Bank had in its possession was an obligation of the Clearing House upon the Deshler National Bank. Without suggestion upon the part of the City Deposit Bank, and upon the request alone of the Clearing House Manager, it accepted this check for two similar obligations of the Clearing House, one drawn upon the Deshler National Bank for a smaller amount, and the other drawn upon the Capital City Bank for $1,161.74, the two checks together making up the amount due the City Deposit Bank from the Clearing House, and equalling the amount of the check drawn by that Association upon the Deshler National Bank originally.

In the conversation between the Clearing House Manager and the cashier of the City Deposit Bank, there is no suggestion of any kind that this exchange was to be made for the purpose of, in any way, preferring the City Deposit Bank as one of the creditors of Reinhard & Company. The object of the Clearing House Manager in desiring the exchange was not disclosed to the City Deposit Bank. The City Deposit Bank could have refused to make the exchange. Had it done so, and collected the amount of the check from the Deshler National Bank, no possible cause of action would have existed in favor of the trustee of Reinhard &

Company against it. The mere fact that, as a matter of accommodation, for some reason not disclosed to it, it agreed to the request of the Clearing House Manager, to substitute for one good check two other good checks, none of them in any way connected with Reinhard & Company, does not, in the least, alter its position.

The law is too well settled to need citation, that an unlawful preference within the meaning of the Bankruptcy Act, must have been a preference obtained by the creditor, in this case the City Deposit Bank, with full knowledge of the insolvency, and with a deliberate intent to obtain the preference at the expense of other creditors.

See Collier on Bankruptcy. 4 Edition 418, et seq.

We have discussed the merits of this case upon the evidence solely, for the reason that it was decided by the Court below solely upon the evidence, and the case was taken from the jury and a verdict rendered for defendant in error for the sole reason that no facts were submitted by plaintiff in error upon the trial of the cause to the jury, which, in the judgment of the Court, justified a verdict.

So far as the merits of the case are concerned, it is a question of fact alone. The legal principles applicable to these facts are elementary. Either the facts showed a preference within the meaning of the Bankruptcy Act or they did not. If they did not then the judgment of the three Ohio Courts passing upon this case successively, should be sustained.

Respectfully submitted,

TALFOURD P. LINN,
OUTHWAITE, LINN & THURMAN,
Attorneys for Defendant in Error.

SUPPLEMENT.

AN ACT.

To amend Sections 6343 and 6344 of the Revised Statutes of Ohio.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That Sections 6343 and 6344 of the Revised Statutes, be and the same are hereby amended so as to read as follows:

SEC. 6343. Every sale, conveyance, transfer, mortgage or assignment, whether made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them, and every act or device done or resorted to by him or them, in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage or assignment made, or judgment suffered by a debtor or debtors, or procured by him or them to be made, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors, at the suit of any creditor or creditors, as hereinafter provided, and shall operate as an assignment and transfer of all the property and effects of such debtor or debtors, and shall inure to the equal benefit of all creditors of such debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured. And every such sale, conveyance, transfer, mortgage or assignment made, and every such judgment suffered, and every such act or device done or resorted to, by any debtor or debtors, in the event of a deed or assignment being filed within ninety (90) days after the giving or doing of such thing or act, shall be conclusively deemed and held to be fraudulent and shall be held to be void as to the assignee of such debtor or debtors, whereupon proof shown, such debtor or debtors was or were actually insolvent at the time of the giving or doing of such act or thing, whether he or they had knowledge of such insolvency or not. Provided, that nothing in this section contained shall vitiate or affect any mortgage made in good faith, to secure any debt or liability

created simultaneously with such mortgage, if the same be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three (3) days after its execution, and where upon foreclosure or taking possession of such property the mortgagee fully accounts for the proceeds of such property.

SEC. 6344. Any creditor or creditors, as to whom any of the acts or things prohibited in the preceding section are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void, and such court shall appoint a trustee according to the provisions of this chapter, who upon being duly qualified shall proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer the same for the equal benefit of all creditors, as in other cases of assignments to trustees for the benefit of creditors. And any assignee as to whom any thing or act mentioned in the preceding section shall be void, shall likewise commence a suit in a court of competent jurisdiction to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and shall administer the same for the equal benefit of all creditors as in other cases of assignment to trustees for the benefit of creditors; provided, that where such assignee fails or declines, upon notice by any creditor or creditors to institute such suit, such creditor or creditors may themselves institute such suit within five days after serving notice upon such assignee to commence such suit, and the procedure and administration shall be the same as is hereinbefore provided for suits commenced by any creditor or creditors.

SECTION 2. That said original Sections 6343 and 6344 of the Revised Statutes be and the same are hereby repealed; and this act shall take effect from and after November 1, 1898.

HARRY C. MASON,
Speaker of the House of Representatives.

ASAHEL W. JONES,
Passed April 26, 1898. *President of the Senate.*

Supreme Court of the United States.

No. 137.—October Term, 1905.

Fred C. Rector, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
The City Deposit Bank Company.

In error to the Supreme Court of the State of Ohio.

[February 19, 1906.]

Mr. Justice White delivered the opinion of the Court.

The firm of Reinhard & Company, composed of John G. Reinhard and Henry A. Reinhard, carried on a banking business in Columbus, Ohio. On April 10, 1900, the firm made a general assignment under the insolvent laws of Ohio. On the following day a petition in involuntary bankruptcy under the laws of the United States was filed against the firm, and on August 10, 1900, it was adjudged bankrupt, and subsequently Rector, the plaintiff in error, was appointed the trustee.

In a Court of Common Pleas of the State of Ohio the trustee began this suit against the defendant in error to recover the sum of $1,300, which it was subsequently agreed was only $1,161.74. The petition alleged the adjudication in bankruptcy and the appointment of the trustee, and based his right to recover upon the ground that on April 10, 1900, the firm had transferred and assigned to the defendant bank, who had received the same the sum of money sued for, which it was alleged was the property of Reinhard & Company, and, in substance, the payment to the bank was alleged to constitute a voidable preference.

The answer admitted the making of the general assignment, the adjudication of the firm as an involuntary bankrupt, and the appointment and qualification of the plaintiff as trustee. The other averments of the petition were denied.

A trial was had to a jury. At the close of the evidence for the plaintiff the court at the request of the defendant instructed a verdict in its favor and judgment was entered dismissing the action. The Circuit Court of Franklin County affirmed the judgment, which was thereafter affirmed by the Supreme Court of Ohio, without opinion. The Chief Justice of the

Supreme Court of Ohio made and the court caused to be filed and entered on its journal the certificate which is in the margin.*

It is contended that this court is without jurisdiction. The argument upon which this proposition is rested is this: First. It is said that whilst in the petition the right of recovery was based upon the ground of fraudulent preference, it was not disclosed therein whether the preference relied upon was in violation of the bankrupt law of the United States or of the insolvent laws of the State of Ohio, and therefore a Federal question was not raised, as it was necessary to specially direct the attention of the State court to such a question if it was intended to rely upon it. Second. But even if a Federal question was referred to in the petition, as the cause of action stated in nowise involved the construction or validity of any provision of the bankrupt act, therefore there is no right to review under section 709 of the Revised Statutes.

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*On motion of the plaintiff in error, Fred C. Rector, trustee, this court orders it to be certified and made part of the record in this case, and the Honorable William T. Spear, Chief Justice of said Supreme Court, does now certify, that in said cause, and on the hearing before this court, it was claimed, contended and alleged by the said plaintiff in error that, on the 10th day of April, A. D. 1900, Reinhard & Company, a partnership, by deeds of its individual members committed an act of bankruptcy, to wit: made a general assignment for the benefit of creditors; that on the 11th day of April, A. D. 1900, a petition in bankruptcy was filed in the District Court of the United States of the Southern District of Ohio, Eastern Division; that on the 10th day of August, A. D. 1900, said Reinhard & Company were, by said court, adjudged bankrupt, and on September 13, A. D 1900, said plaintiff in error was appointed trustee thereof; that on the 10th day of April, A. D. 1900, said Reinhard & Company, then being to the knowledge of the defendant in error, insolvent, assigned and transferred to the defendant in error, The City Deposit Bank Company, and that the said last named company then and there received from said Reinhard & Company the sum of $1,161.74 of moneys belonging to said Reinhard & Company; that said assignment and transfer was an unlawful preference, given to the said defendant in error, and violated the provisions of section 60*a* and section 60*b* of the United States bankrupt law; that it became and was material to the said cause for this court to determine whether the said sum of $1,161.74 was so assigned and transferred; whether it was an unlawful preference; whether it was a violation of said section 60*a* and section 60*b* of the said bankrupt law; and whether the said plaintiff in error, under said law, was entitled to have the said assignment and transfer set aside and declared null and void, and to have a judgment and order for the recovery of said money against said defendant in error; that the decision of this court was adverse to the claims and contentions of the said plaintiff in error, in this that said court decided that said assignment and transfer of said sum of $1,161.74 was not an unlawful preference, in violation of the said provisions of the bankrupt law, and that the said plaintiff in error was not deprived of any right under said law, and was not entitled to have said assignment and transfer set aside, and to recover the said sum of $1,161.74 from said defendant in error.

Both these contentions might well be disposed of by saying that the action was brought by a trustee appointed under the bankrupt law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a Federal question, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States. (*Peck* v. *Jenness*, 7 How. 612; *Burton* v. *Geiler*, 108 U. S. 681; *Williams* v. *Heard*, 140 U. S. 529; *Dushane* v. *Beall*, 161 U. S. 613; *Stanley* v. *Schwalby*, 162 U. S. 275.) Whether expressions, relied upon in argument, contained in *Cramer* v. *Wilson*, (195 U. S. 416,) must be taken as not in harmony with the previous cases, or whether those expressions simply implied that where a right claimed by a trustee in bankruptcy in its final aspect depended solely upon a State law, the courts of the United States would follow the construction given by the highest courts of the State to the State law, we do not deem it necessary now to say, for, without reference to the doctrine announced in the previous cases and without regard to the import of the case of *Cramer* v. *Wilson*, the contention as to the want of jurisdiction is without merit. It is to be observed that the matter certified by the Supreme Court of Ohio was made by that court a part of the record, and, if it be considered as having the force of an opinion of that court, would clearly establish the fact that the court had considered and decided a Federal question, which, apart from other considerations, would obviously give jurisdiction. But even if the action of the court be treated as not an opinion, but a mere certificate, the same result would follow. It is elementary that the certificate of a court of last resort of a State may not import a Federal question into a record where otherwise such question does not arise, it is equally elementary that such a certificate may serve to elucidate the determination whether a Federal question exists. Applying this principle, we think as the suit was brought by a trustee in bankruptcy in virtue of the power and authority conferred upon him by a law of the United States, the certificate makes clear the fact, if it were otherwise doubtful, that rights under the bankrupt law were relied upon and passed upon below. And as, this being true, the right of the trustee in bankruptcy to recover thus depended upon a law of the United States, there was clearly jurisdiction within the purview of section 709 of the Revised Statutes. (*Nutt* v. *Knut*, 200 U. S. 12.)

Coming to the merits, we premise that if the court below had found the facts we should be bound thereby. Here, however, as we have seen, the court below did not find the facts, but instructed a verdict for the defendant, being of the opinion that upon no view of the evidence was there a case made which would have justified a verdict for the plaintiff. This raises a question of law, which is this: Was the evidence such as would have justified the jury, under any reasonable view thereof, to find for the

plaintiff; in other words, was there sufficient evidence to warrant the submission of the case to the jury? This brings us to consider the evidence, in order to ascertain what inferences, one way or the other, might reasonably have been drawn by the jury therefrom.

Outside the testimony of the trustee, as to the insolvency of the bankrupt estate, the only evidence introduced was the testimony of John Field, manager of the Columbus Clearing House Association. By that testimony the following facts were disclosed:

Prior to the bankruptcy of Reinhard & Company that firm carried on a banking business in the city of Columbus, Ohio, and the firm, as well as the City Deposit Bank Company, were members of the clearing house association. In order to accomplish the purpose of its existence the clearing house association was an agent, for a limited purpose, of the banks composing the association, that is, its duty was to clear or balance daily the claims of the respective banks, one against the other, resulting from the checks drawn upon and held by the different members. The only source from which the association derived the means to carry on its operations was from assessments upon the members, which were made solely for the purpose of paying rent, salaries, and similar expenditures. To effect the clearings each member of the association, on banking days, sent to the clearing house, at a specified hour, the checks held by it against other banks. The checks sent by each member were considered as remaining the property of the member, the association being simply an agent for collection. Where the sum of the checks presented by one bank exceeded the sum of the checks against it presented by other members of the association, that bank had, of course, a credit balance. Where the checks presented by a particular bank against other banks were less than the sum of the checks against it presented by other banks, that bank had a debit balance. Where a bank was entitled to a credit or payment corresponding to the excess which the sum of the checks presented by it exceeded the sum of the checks against it, the clearing house paid that bank the difference by drawing its check upon one or more of the debtor banks; and each member constituted the manager of the association its agent to draw a check or checks upon such member for any balance found to be due by that member.

In making the clearings on April 9, 1900, the day before the assignment of Reinhard & Company, the checks presented against that firm in the clearings exceeded the checks presented by it against other banks by $1,161.74, that is, Reinhard & Company, as a result of the clearing, was indebted in that amount. On the same day the City Deposit Bank presented in the clearings checks drawn upon other banks which exceeded by $10,245.63 the amount of the checks presented against that bank; in other words, as a result of the clearings it was entitled to receive the

amount of money just stated. In payment of the balance the clearing house gave to the City Deposit Bank a check on Reinhard & Company for the sum due by that firm, viz., $1,161.74, and a check upon the Capital City Bank for $9,083.89. There was nothing in the evidence to show upon what bank the checks were drawn which were held by the City Deposit Bank on April 9, and which it presented for clearing on that day, nor was there anything in the evidence to show upon what banks the checks were drawn which were presented by Reinhard & Company for clearing on the same day. The check of the clearing house on Reinhard & Company for the balance due by that firm in the clearings, and which, as we have said, was given to the City Deposit Bank, was not on that day presented by the City Deposit Bank to Reinhard & Company for payment. On the contrary, the City Deposit Bank held the clearing house check until the next day. When on the morning of the 10th of April the City Deposit Bank presented its checks for clearing, it treated the clearing house check on Reinhard & Company as being entitled to participate in the clearing and included it in the checks presented for that purpose.

On the morning of April 10 the checks as presented to the clearing house by the City Deposit Bank, including the clearing house check, exceeded the amount of the checks presented against it by other banks in the sum of $4,875.98; and the clearing house gave to the City Deposit Bank its check on the Deshler National Bank for that sum. On that day the checks presented by Reinhard & Company against other banks aggregated $2,132.19, whilst the checks against it presented by other banks amounted to $6,369.30, leaving a balance due by Reinhard & Company in the clearing of $4,237.11. Shortly after the clearing was made it developed that Reinhard & Company had made a general assignment for the benefit of their creditors and had suspended payment, and as a result, of course, it was certain that the firm of Reinhard & Company would not meet its obligations. The rules of the clearing house had provided for such a contingency as follows:

"In case of failure to respond promptly to the checks of the manager, on the part of any member of the association, they shall be immediately returned to the manager, who shall call upon the other banks or bankers to make up the sum for which payment has been refused in proportion to the amount of checks upon the defaulting member sent into the clearing house at the preceding settlement, which sums so furnished or contributed shall constitute claims in the hands of the responding members respectively against the defaulting members, and it is hereby agreed that the checks received from the clearing house by the defaulting members shall be delivered, if required, to the member owning the same without mutilation; the agency of the clearing house in the matter, it is understood, is only as a trustee, and in no case is the association to be held responsible for any loss that may occur."

All the checks drawn against Reinhard & Company and which figured in the morning settlement were returned to the clearing house with the information that Reinhard & Company had failed. The clearing house thereupon revised the previous settlements by deducting, wherever appearing, the credits which had been given for checks drawn on Reinhard & Company, which had been presented by other banks, and changed the balances to correspond with such deductions, and the dishonored checks were returned to the respective banks. Having thus returned all the checks which had been presented against Reinhard & Company on that morning, the entire sum which had been collected on the checks sent to the clearing house by Reinhard & Company on the same morning for the purpose of the clearing, viz., $2,132.19, remained in the hands of the clearing house without any debit against it. Being thus in possession of the sum referred to, the manager testified that he paid $970.45 thereof to the Commercial Bank and the balance of $1,161.74 to the City Deposit Bank. With a view of making the payment to the last named bank, the manager went to the office of the City Deposit Bank. Conflicting versions were given of what took place at the interview, which was had with an officer of the City Deposit Bank named Jennings. The manager at first testified:

"I told him that the Reinhards had failed, and that his check had been returned, and that I had a balance due Reinhard & Company, and that I would substitute a check on the Capital City Bank for this check on Reinhard, which had been returned. Mr. Jennings said that he would—I think he said he would telephone Mr. Outhwaite, and if it was all right he would return my check, the Reinhard check. . . ."

Subsequently, referring to checks which the witness had carried to the City Deposit Bank to give to that bank in exchange for the prior check of $4,875.98, he said:

"It runs in my mind . . . that I told him that I wanted to substitute those, and that he asked me what for, and I told him not to ask any questions—I am not sure about that—that I wanted to substitute those checks."

Certain it is, however, that the manager took up the check for $4,875.98 drawn on the Deshler Bank, which had been given to the City Deposit Bank in discharge of the credit balance in its favor as the result of the previous clearing of that day, and substituted for it a check for $3,714.24, drawn on the Deshler National Bank, and in addition gave a check drawn on the Capital City Bank for $1,161.74, the exact amount of the clearing house check which had been thrown out of the clearings.

Analyzing these facts for the purpose of arriving at the inferences which may reasonably be deduced from them, this plainly results: When on the morning of April 10, 1900, as the result of the failure of Reinhard & Company, the clearings of that day required revision, the clearing house having received back the checks drawn on Reinhard & Company which it

had cleared for its members that morning, made new settlements with those members based upon deductions from the original settlements of the sum of the checks which had been put in the clearings on that morning and were afterwards dishonored. The result of each new settlement was that the amount due to the member was reduced or the indebtedness shown on the original settlement was increased, according as by the original settlement the member was a creditor of or a debtor in the clearing; and, as a necessary consequence of the new settlements having eliminated all the debits against Reinhard & Company, the clearing house held, as the property of that firm, the proceeds of the checks on other banks which that firm had sent for clearing on that morning.

The statements of the manager as to what was done with the clearing house check which had been put in the clearings by the City Deposit Bank are not perfectly clear. In one aspect he returned that check to the City Deposit Bank as he had returned the other dishonored checks, and then gave to the City Deposit Bank a check for the amount due it on the revision of the clearing, ($3,714.24,) and also delivered a check for $1,161.74, to take up the dishonored clearing house check. In another aspect the same result was brought about without any return of the dishonored check. The mere form of the transaction, however, does not affect its nature. The payment out of this fund by the manager, in part to the City Deposit Bank and in part to another bank, therefore amounted simply to this, that in the revision of the clearings, although the clearing house eliminated, and returned the checks which had been debited against Reinhard & Company, and were subsequently dishonored, it retained and appropriated the credits arising from the checks put in by Reinhard & Company for the purpose of the clearing of the morning. Having thus appropriated those credits, it used them *pro tanto* to pay the clearing house check on Reinhard & Company held by the City Deposit Bank as the result of the clearings of the previous day. But as the clearing house had received the checks from Reinhard & Company on the morning of April 10, 1900, for the purpose of making the clearing on that day, such agent was without power, after returning to the banks which had presented the same, the checks debited against the firm, to hold on to the credits of Reinhard & Company, and treat them as subject to be appropriated. Indeed when the inferences from the proof are thus accurately fixed it is apparent that the transaction was in substance like the one which was held by this court in *Yardley* v. *Philler*, (167 U. S. 344,) to be a misappropriation and besides to constitute a fraudulent preference within the meaning of the National Banking Act.

The result, however, of the proof would not be different, even if it be conceded that under the rule, as to clearings, which we have quoted, the clearing house would have had the power, upon the default of one of its members, simply to call upon the other members to pay in a *pro rata* pro-

portion of the amount of the check or checks which had been drawn upon the defaulting member, and to treat the credit standing in the clearing in favor of the defaulting member as belonging proportionately to the contributing members. We say this because even under such hypothesis the clearing house check held by the City Deposit Bank would not have been entitled to so participate. That check was the result of the clearings of the previous day, and, under the hypothesis as to the meaning of the rule in which we have indulged, the holder was only entitled to obtain payment, *pro rata*, from those who had presented checks against Reinhard & Company in the clearing wherein the check was given.

Was the receipt and appropriation of the $1,161.74 by the City Deposit Bank a preference within the bankruptcy law? is, then, the question. It is said that it was not, because to constitute a preference under that law the transfer or payment must have been the act of the bankrupt. (*Western Tie & Timber Co.* v. *Brown*, 196 U. S. 502.) Here it is insisted that it cannot be so held, because there was nothing in the proof warranting the implication that the firm authorized or ratified the misappropriation or that the clearing house was the agent of the firm when it made such misappropriation. The latter proposition rests on the contention that whatever agency the association possessed in virtue of its authority to make clearings was revoked by the fact of the voluntary assignment made by Reinhard & Company before the money was appropriated to the City Deposit Bank. Whilst it may be conceded that these propositions are well founded, it does not follow that the inferences deducible from the evidence did not warrant the conclusion that under the bankrupt law of the United States there was a duty on the part of the City Deposit Bank to pay over to the trustee the sum received by it of the funds of Reinhard & Company deposited on April 10, 1900, with the clearing house for the purposes of the clearing of that date. From the inferences which we have stated were properly deducible from the evidence, it follows that the jury would have been amply justified in finding that the clearing house had made a wrongful disposition of a trust fund in favor of the City Deposit Bank, which institution had notice, either actual or constructive, of the misappropriation. (*Western Tie Co.* v. *Timber Co., supra.*)

We interpret the certificate of the Supreme Court of Ohio as establishing that that court did not rest its affirmance of the judgment rendered by the trial court against the trustees upon the mere technical ground that the petition counted upon a voidable preference, and there could not be a recovery unless the facts constituted such preference, even although the evidence justified the inference that the money which the City Deposit Bank received from the clearing house association, under the circumstances we have stated, was the property of Reinhard & Company, which the bank by operation of the bankrupt law was obliged to account for to the

bankrupt estate. We so conclude, because the Supreme Court of Ohio not only certified that its decision "was adverse to the claims and contentions of the said plaintiffs in error, in this, that said court decided that said assignment and transfer of said sum of $1,161.74 was not an unlawful preference, in violation of the said provisions of the bankrupt law," but in addition, moreover, certified that the case was decided against the trustees, because under the facts proved the trustee "was not deprived of any right under said (bankrupt) law, and was not entitled to have said assignment and transfer set aside, and to recover the said sum of $1,161.74 from said defendant in error."

The judgment of the Supreme Court of Ohio must be reversed and the cause be remanded to that court for further proceedings, not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.